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No. (1)

Supreme Court, U.S.
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In The Supreme Court of the United States

IN RE NAVY CHAPLAINCY;

CHAPLAINCY OF FULL GOSPEL CURCHES, ET AL.,
Petitioners,

V.

UNITED STATES NAVY, ET AL.,
Respondents.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the
District of Columbia Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Petitioners are representatives of a class of Non-liturgical Protestant Navy chaplains and two chaplain- endorsing agencies who are seeking an injunction to stop the Navy's denominational gerrymander that (1) appoints as chaplains clergy of a favored denomination who exceed statutory age limits and (2) retains clergy of that favored denomination past the mandatory separation age to allow such clergy to qualify for pensions. After an initial denial was reversed on appeal, on remand, the District Court held that the Petitioners did not have standing to sue. The Court of Appeals, with one dissenter, affirmed.

Petitioners present the following questions for review:

I. Does exposure to the Navy's denominational preference, manifested by the illegal appointment of only Roman Catholic clergy whose ages exceed legal limits and maintaining them on active duty past the mandatory separation age to allow qualification for pensions, cause an injury to the Petitioners giving them standing to challenge the Navy's denominational preference?

II. Do Petitioners have taxpayer standing under *Flast v. Cohen*, 392 U.S. 83 (1968), to challenge Congress' funding of a Navy program that

established and maintains a denominational gerrymander benefiting solely Roman Catholic clergy illegally appointed and retained as chaplains?

III. Did the Court of Appeals abuse its discretion by not issuing an injunction when confronted with an unchallenged Navy denominational preference that has existed for over thirty years in violation of the laws and Constitution of the United States?

PARTIES TO THE PROCEEDINGS

Pursuant to Supreme Court Rules 14.1(b) and 22.3(a), the following persons have an interest in the outcome of this Petition for Certiorari:

Petitioners, current, former or retired Navy chaplains whom the Navy categorizes as "Non-liturgical Protestant,"[1] are plaintiffs in three now consolidated cases: *Chaplaincy of Full Gospel Churches v. Winter ("CFGC")*, filed November 1999 by the Chaplaincy of Full Gospel Churches ("CFGC") and eight of its endorsed Non-liturgical chaplains; *Adair v. Winter*, filed March 2000 by 16 Non-liturgical chaplain plaintiffs[2] who originally sought class action status for all Non-liturgical chaplains;[3] and *Gibson v.*

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[1] The Navy divides its chaplains and Department of Navy ("DON") personnel into four faith group categories or clusters: Roman Catholic, liturgical Protestant, Non-liturgical Protestant, and Special Worship. *See* Glossary for definitions.

[2] A 17th original plaintiff's collateral matter in the Federal Court of Claims resulted in his promotion, and he was voluntarily dismissed from *Adair*.

[3] *Adair v. England*, 209 F.R.D. 5 (D.D.C. 2002), granted the *Adair* Plaintiffs' motion for class certification in 2002, but the District Court failed to define the class. After the Navy discharged the last active duty plaintiff in 2006, destroying *Adair*'s ability to represent active duty chaplains,

U.S. Navy, originally filed in the Northern District of Florida in 2006 by the Associated Gospel Churches and 41 Non-liturgical chaplains who seek to represent a class of similar chaplains. *Gibson* was transferred to the District of Columbia on the Navy's 28 U.S.C. § 1404(a) motion. The District Court consolidated all three cases as *In re Navy Chaplaincy*, June 18, 2007.

The Petitioners, Plaintiffs-Appellants in the Court of Appeals, are: Robert Adair, Richard L. Arnold, the Associated Gospel Churches, Ray A. Bailey, William Blair, Michael Belt, Rick P. Bradley, George P. Byrum, Andrew Calhoun, Martha Carson, The Chaplaincy of Full Gospel Churches, Gregory De Marco, Timothy J. Demy, Patrick T. Doney, Joseph E. Dufour, Floyd C. Ellison, Larry Farrell, Alan Garner, David L. Gibson, John Gordy, Richard Hamme, Furniss Harkness, William A. Hatch, Jr., Gary Heinke, Robert L. Hendricks, Frank Johnson, Mark Johnston, Laurence W. Jones, Samuel David Kirk, Klon Kitchen, Frank S. Klapach, Thomas G. Klappert, Jan C. Kohlmann, Allen L. Lancaster, Michael Lavelle, George Linzey, James Looby, Manuel Mak, Jairo Marino, Walker E. Marsh, Jr., Denise Merrit, David Mitchell, Timothy Nall, Dan Nichols, Edith Rene Porter-Stewart, James V. Prince, Duane Purser, Raphael Quiles, Javier Roman, Dan Roysden, Thomas Rush, Mary Helen Spalding, Lloyd Scott, Gary Paul

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the *Adair* plaintiffs requested and the Court granted vacation of the class certification motion.

Stewart, Lyle Swanson, Fred A. Thompson, Jr., Glenn Thyrion, Armando Torralva, Thomas Daniel Tostenson, James Twamley, Thomas R. Watson, James Weibling, Barby Wilson, Wilson W. Wineman, David Wilder, Michael Wright, and Chris Xenakis.

Petitioners Associated Gospel Churches and the Chaplaincy of Full Gospel Churches are recognized by the Department of Defense ("DOD") as chaplain-endorsing agencies that endorse clergy from their respective independent Christian evangelical churches as chaplains for the Armed Forces, Veterans Administration, and other agencies using chaplains. Both agencies have chaplains as individual plaintiffs and also bring suit as representatives of their endorsed Navy chaplains.

The Respondents, Defendants-Appellees in the Court of Appeals, are the United States Navy, the Secretary of the Navy (the "Secretary") Donald Winter, and the following persons named in one of the consolidated cases in their official capacity; Vice Admiral Mark E. Ferguson III, Chief of Naval Personnel, and Rear Admiral Robert F. Burt, Chief of Chaplains.

CORPORATE DISCLOSURE STATEMENT

Petitioner Associated Gospel Churches ("AGC"), a DOD-recognized endorsing agency, is a fellowship of independent, non-denominational Christian evangelical churches which has endorsed chaplains to the military services since 1943. AGC is a 28 U.S.C. § 501(c)(3) organization incorporated in Pennsylvania, has no stock that is publicly traded and has no parent or subsidiaries. Its offices are located at 209 Pine Knoll Drive, Suite B, Greenville, South Carolina.

Petitioner Chaplaincy of Full Gospel Churches ("CFGC") is a DOD-recognized endorsing agency established to endorse chaplains from independent Christian charismatic, non-denominational churches, fellowships, and associations. CFGC is a 28 U.S.C. § 501(c)(3) organization and a subsidiary of Ammerman Trinity Ministries, Inc., a corporation organized and registered under Texas law. Neither Ammerman Trinity Ministries, Inc. nor CFGC is a corporation whose stock is publicly traded.

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GLOSSARY

AGC	Associated Gospel Churches
CFGC	Chaplaincy of Full Gospel Churches
CHC	Chaplain Corps
DOD	Department of Defense
TIS	Time in Service

Faith Group Categories ("FGC"). The Navy divides its chaplains and personnel into four general religious groupings, according to allegedly similar faith group worship or religious practices.[4] The four FGC are Catholic, Liturgical Protestant, Non-liturgical and Special Worship.

1. Catholic includes the Roman Catholic Church and those denominations that recognize

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[4] The non-liturgical plaintiffs challenge the Navy's categorization system as applied to their category as arbitrary and capricious because it places in one category faith groups which reject and are hostile to other non-liturgical faith groups' worship practices and theologies. This (1) contrasts with the worship and theological similarities common to the Liturgical Protestant category and (2) hides prejudice within the non-liturgical category.

the spiritual authority of the Pope, of which there are none at issue in this case.

2. "Liturgical Protestant" collectively describes those Christian denominations which trace their origins to the Protestant Reformation, *e.g.*, Lutheran and Reformed, emphasize a sacramental theology including infant baptism, worship under officially adopted forms, wear vestments in their services, and follow a cycle of lectionary[5] readings. Navy chaplains sometimes refer to these churches as "high church." "Liturgical Protestant" means chaplains of the various Lutheran, Reformed, Episcopal, Methodist, Methodist Episcopal, Presbyterian, and Congregational faith groups.

3. "Non-liturgical" refers to those Christian denominations or faith groups without a formal liturgy or order in their worship service. In general, they emphasize a Word-centered theology, *i.e.*, preaching rather than liturgy, baptize only adults or children who have reached the age of reason, and their clergy do not wear vestments and do not follow a cycle of

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5 A sequence or list of scripture readings to be read in church services at specific times throughout the year. Webster's New World Dictionary, p. 834 (1962).

lectionary readings during services. Some Navy chaplains refer to these faith groups as "evangelicals" or "low church." Baptist, Evangelical, Pentecostal, Disciples of Christ, Bible, and Charismatic churches are examples of Non-liturgical Christian faith groups.

4. The "Special Worship" category includes faith groups, both Christian and non-Christian, whose ministry needs are distinctly different from both Catholic and other Christian faith groups. Jewish, Christian Science, Orthodox, Seventh Day Adventist, Latter Day Saints (Mormons), Buddhist, Hindu, Moslem, and Unitarian-Universalist faith groups are in this category.

"Liturgical" will mean both Catholic and Liturgical Protestant chaplains.

CITATIONS OF ORDERS AND OPINIONS

The opinion and judgment of the United States Court of Appeals for the District of Columbia (the "Decision"), *In re Navy Chaplaincy*, 534 F.3d 756 (D.C. Cir. 2008), is set forth in the Appendix beginning at A-1. Judge Rogers' dissent is set forth in the Appendix at A-18. The Court of Appeals' unreported order denying Petitioners' Petition for Rehearing En Banc is set forth in the Appendix at A-39.

The opinion and judgment of the District Court for the District of Columbia denying Petitioners' motion for a preliminary injunction, *In re Navy Chaplaincy*, 516 F. Supp. 2d 119 (D.D.C. 2007), is set forth in the Appendix beginning at A-41.

Chaplaincy of Full Gospel Churches v. England ("Chaplaincy"), 454 F.3d 290 (D.C. Cir. 2006), is the Court of Appeals' 2006 opinion and judgment reversing the District Court's denial of Petitioners' original 2003 preliminary injunction motion and remanding to the District Court. *Chaplaincy* is not at issue, but provides the background necessary to understand the Decision's substantial error.

STATEMENT OF JURISDICTION

The Court of Appeals entered the judgment for which review is sought on August 1, 2008. The

Petitioners filed a timely Petition for Rehearing En Banc on September 12, 2008, and the Court of Appeals ordered the Respondents to respond. After consideration, the Court of Appeals' order, entered November 17, 2008, denied rehearing. Judges Rogers and Brown voted to grant the petition. 28 U.S.C. § 1254 grants this Court jurisdiction.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The First Amendment to the Constitution provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof .....

10 U.S.C. § 14509 and 10 U.S.C. § 14703 establish Reservists' age limitations; 10 U.S.C. § 14515 establishes Reservists' age separation options. A-58-60.

STATEMENT OF THE CASE

The main issue presented is very simple: does exposure to the Navy Chaplain Corps' (the "CHC") denominational gerrymander benefitting only Catholic chaplains produce injury sufficient to provide standing to Petitioners, sixty-five present, past and retired Navy Non-liturgical Protestant chaplains who represent a putative class of Navy Non-liturgical

Protestant chaplains, and two Christian evangelical chaplain-endorsing agencies in their representative capacities.

Petitioners challenge the Navy's religious prejudice against themselves and Non-liturgical clergy and chaplains manifested by denominational preferences for Catholic and Liturgical Protestant clergy and chaplains in every aspect of Chaplain Corps' management practices and policies. This includes the Navy's accession and retention policies, whose specific practices are at issue here. The separate complaints in this consolidated case allege that the Navy has a practice of (1) appointing as Reserve Chaplains Catholic clergy ineligible for appointment because they exceed statutory and regulatory age limits and (2) retaining them on active duty past age 62 (formerly age 60), Title 10's mandatory Reserve separation age, until the illegally appointed Catholic chaplains reach twenty years time in service ("TIS"), qualifying for a pension.

1. *Statutory and Regulatory Age Limits on Chaplain Appointments and Retention.* From May 1986 through 2005, covering the period the Catholic chaplains at issue here were appointed, Secretary of Navy Instruction ("SECNAVISNT") 1120.4A, ¶6 established age 40 as the age limit for appointment as a chaplain without prior military service:

> 6. Basic qualifications. To be eligible for appointment as a Chaplain Corps officer in either the active duty or Reserve components..., the applicant must meet the following requirements:
>
> ***
>
> b. Age. Must be able to complete 20 years of active commissioned service by age 60. The Deputy Chief of Naval Operations ... may waive the age restrictions up to age 62 for otherwise qualified applicants for appointment on the active duty list or in the Reserve component in [four] instances [not relevant here]:

1120.4a has no provisions allowing chaplain appointments beyond ¶ 6's age limits. 10 U.S.C. § 14509, "Separation at age 60," mandated the age 40 limitation because, until 2006, all chaplains were commissioned as Naval Reservists and had to be separated at age 60 unless they later became Regular officers, whose separation age was 62. A-58. Amendments to § 14509 in 2006 changed Reservists' separation age from 60 to 62, matching 10 U.S.C. § 1251(a)'s Regular officer separation or retirement age.

Section 14703 authorizes the Secretary of Navy (the "Secretary") to "retain in active status any Reserve officer appointed ... in the Chaplain Corps" beyond age 62 to age 68, with one limitation.

Subsection (a)(2) excludes "officers referred to in Sections 14503, 14504, 14505 and 14506," A-51, addressing Reserve officers who failed of selection ("FOS") to the grade of Commander ("CDR"), describing the chaplains at issue here, lieutenants ("LTs") and lieutenant-commanders ("LCDRs") who FOS to the next grade. Section § 14703(b) "Separation at Specified Age" provides: "An officer may not be retained on active status under this section later than the date on which the officer becomes 68 years of age [age 67 until September 2006]." A-59-60; *see Chaplaincy*, 454 F.3d at 294 ("Provided a reserve officer in the Chaplain Corps has not twice ["FOS"], the Secretary may retain a chaplain until age 67"). Section 14703 has no exception similar to 10 U.S.C. § 1251(d)(2) allowing the Secretary to defer Regular chaplain retirements past age 68 for a specific need of the service. DOD Directive ("DODD") 1320.8, Continuation of ["Officers"], ¶4.9 states: "An officer may not be retained on active status under this subsection later than the date on which the officer becomes 67 years of age." No past or current statute allows the Secretary to retain a chaplain on active duty past § 14703's age limit to allow a chaplain to qualify for a pension.

Section 14515, "Discharge or retirement for age" requires Reservists reaching mandatory separation age be transferred to the Retired Reserve "if the officer is qualified for such transfer," subsection (1), or "be discharged from the officer's Reserve

appointment if the officer is not qualified for transfer to the Retired Reserve," subsection (2). A-59. DOD has five Retired Reserve Categories ("RRC") defined *solely* in terms of Reservists entitled to retired, retainer, or disability pay. *E.g.*, DOD Directive 1402.1, Subject: "Employment of Retired Members of the Armed Forces," ¶3.1, specifically defines the term "Retired Member of the Armed Forces" as "a member or former member of the Armed Forces who is entitled to retired, retirement, or retainer pay."

2. *Petitioners' Injunction Motion.* Initial discovery identified 26 illegally appointed Reserve Catholic chaplains still on active duty; seven of these, appointed in their late 50s, were over age 67 in 2003, with four in their 70s. In addition to illegally appointing these Reserve Catholic chaplains, the Navy allowed them to continue on active service past age 60 and, upon reaching age 67, illegally *transferred them to the Retired Reserve, although* none met any DOD RRC criteria, and then recalled them to active duty with the status code of "4109," Retired Reserve recalled to active duty. Only Catholic chaplains were allowed to remain past their statutory separation age to qualify for pensions.

Armed with evidence verifying Respondents' denominational gerrymander with its illegal appointments and retention, the *CFGC/Adair* plaintiffs filed a preliminary injunction motion in June 2003. The District Court denied it in February

2005, holding plaintiffs had not established irreparable harm. Following this Court's precedent, *Chaplaincy* reversed, holding "the pertinent liberty here is protection against government imposition of a state religion or religious preference," 454 F.3d at 302, and defining the harm Establishment Clause violations inflict:

> Where, as here, the charge is one of official preference of one religion over another, such governmental endorsement "sends a message to non-adherents [of the favored denomination] that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community." *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring). This harm, to which Appellants repeatedly refer throughout their briefs, *see, e.g.*, Appellants' Reply Br. 9 ("Here the message is the Navy prefers Catholics."), occurs merely by virtue of the government's purportedly unconstitutional policy or practice establishing a religion....

Id. *Chaplaincy* then held "a party alleging a violation of the Establishment Clause per se satisfies

the irreparable injury requirement of the preliminary injunction calculus," *id.* at 304, and remanded to the District Court to "carry out the remainder of the preliminary injunction analysis." *Id.* at 305.

Following remand, Petitioners again moved for an injunction enjoining the Navy's three-part denominational gerrymander they called the "4109 Program" consisting of: (1) the illegal appointment of over-age Catholics as chaplains, (2) their illegal continuation on active duty past age 60 (now age 62), and (3) continued illegal active duty past age 67 until retirement. They showed, between 2003 and 2007, four of the original seven 4109s over age 70 in 2003 retired with pensions (Fry, Gay, Gergil and Steed (age 77)) while the Navy granted three more Catholic chaplains 4109 status: Erestain, Finley and Walsh. None met the 20 years TIS required for the Retired Reserve. Petitioners showed Petitioner Stewart served with 4109 LCDR Erestain, who retired in July 2007 at age 70, a point emphasized at oral argument to illustrate Petitioners' exposure to and contact with the Navy's message of prejudice and preference. A-24 n.4. Respondents' March 2007 Declaration identified six additional Catholic Reserve chaplains illegally retained on active duty beyond their age 62 statutory separation age to enable them to qualify for pensions.

Petitioners argued the Navy could not justify the 4109 Program under strict scrutiny because it was illegal, served no compelling purpose and regulations

directed commanders to hire contract clergy when necessary to meet recognized needs, avoiding long-term taxpayer costs. The record provides no evidence justifying the illegal appointment of over-age Catholic clergy or their continuation on active duty. Respondents' October 1999 (fiscal year 2000) "Study on Religious Affiliation in the Department of Navy ["DON"]" admitted, "The Chaplain Corps has never conducted an in-depth study of the religious affiliation of members in the Navy and Marine Corps." Petitioners' statistician demonstrated DON Catholics had twice the accessibility to a priest than civilian Catholics on a priest-per-Catholic basis.

Navy witnesses admitted that DOD required every Reservist be placed in a legitimate DOD Reserve category and no DOD regulation provided the Navy authority to classify its illegally accessed clergy as Retired Reserve ("4109s"). Instead, the Navy argued it could classify these over-age non-eligible for retirement Catholics as "honorary retirees," a pre-World War II statutory program, specifically terminated by § 803 of the 1952 Reserve Reorganization Act, 66 Stat. 481, 505.

3. *The Decisions Below at Issue.* The District Court, ignoring the 4109 Program's illegal appointment and continuation parts and *Chaplaincy*'s definition of Petitioners' injury resulting from Respondents' message of preference, found Petitioners, who had been legally appointed, lacked

Article III standing because no plaintiff had been refused retention beyond age 60, A-52-53, and taxpayer standing. A-53-55. The Court of Appeals affirmed under 28 U.S.C. § 1292(a). It ignored the gerrymander that began with illegal appointment limited only to Catholics and, despite Respondents' counsel's admission exposure to a preference would provide standing, *see* A-25, found (1) Petitioners suffered only the "Psychological consequence" from "observation of conduct" and no standing, A-16 (citing *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464 (1982)), and (2) had no standing as taxpayers. A-12. The Court of Appeals distinguished this Court's "religious display" and prayer cases, *e.g., McCreary County v. ACLU of Kentucky*, 545 U.S. 804, 851–52 (2005), by assuming this Court assumed jurisdiction sub silentio, A-14-15, although Petitioners' en banc petition showed the lower courts in each case had established standing.

Judge Rogers dissented, arguing the decision contradicted this Court's and the Circuit's Establishment Clause precedent and *Chaplaincy*'s irreparable harm holding, *i.e.*, how could irreparable harm not provide standing? A-22-23. She argued the Navy's message of denominational preference and prejudice harms Petitioners by direct contact with the Navy's unconstitutional message directed specifically at them. A-22-25. "[G]overnment action that draws a line around a religious denomination in a community

can send a symbolic message of preference that needs no words just as easily as the government's direct presentation of a religious symbol." A-33.

> Appellants ... are not strangers to the Navy's 4109 program. Their membership within the Chaplain Corps and the resulting receipt of a message of denominational preference makes them comparable to a citizen who has "personal contact with the alleged establishment of religion," such as in the religious display cases.

A-24-25 (quoting *Suhre v. Haywood County*, 131 F.3d 1083, 1086 (4th Cir. 1997)). Judge Rogers argued Respondents' admitted exposure to a denominational preference created standing, A-25, 36, explaining Petitioners are not seeking retirement benefits but an end to a denominational preference communicating the Navy's messages of preference for Catholics and hostility to Petitioners, 30-31, directly affecting them. A-28-29, 34-37. A 4109 chaplain's very presence in "a narrowly defined community" communicated a religious message through ... religious symbols. A-37.

REASONS FOR GRANTING THE WRIT

Since *Everson v. Board of Education of Ewing*, 330 U.S. 1 (1947), this Court has emphasized the

constitutional mandate that is "the touchstone of Establishment Clause jurisprudence: neither a state nor the Federal Government can pass laws which aid one religion, aid all religions, or prefer one religion over another." *Lee v. Weisman*, 505 U.S. 577, 600 (1992) (Blackmun, J., concurring) (citing *Everson*, 330 U.S. at 15). Twenty-two Establishment Clause cases cite this touchstone. To safeguard that mandate, this Court requires careful "examination of any law challenged on establishment grounds with a view to ascertaining whether it furthers any of the evils against which that Clause protects." *Committee for Public Education v. Nyquist,* 413 U.S. 756, 794 (1973) (quoting *Walz v. Tax Comm'n of New York City*, 397 U.S. 664, 668 (1970)). *County of Allegheny v. ACLU*, 492 U.S. 573, 595 (1989) (quoting *Lynch,* 465 U.S. at 688 (1984) (O'Connor, J., concurring)), defined the Establishment Clause injury as the dual messages of prejudice and preference. The courts below ignored that definition of injury, "touchstone" and "careful examination" precedent when faced with undisputed evidence of Respondents' establishment of a denominational gerrymander created by violating their own regulations and Title 10. The Decision allows the Navy to continue its undisputed denominational preference, funding benefits for one denomination's aged clergy.

The courts below have ignored (1) this Court's precedent defining Establishment Clause injury and standing in terms of "zones of interest" violations, (2)

the ten Circuit Court holdings finding exposure to government Establishment Clause violations provides standing, and (3) Respondents' admission exposure to a denominational preference provides standing. The decisions below create an anomaly in Establishment Clause jurisprudence. Citizens in the Fifth and Sixth Circuits can challenge Ten Commandment displays in public parks, *Van Orden v. Perry*, 545 U.S. 677 (2005), and on government walls, *McCreary County*; taxpayers in the First and Third Circuits can challenge crèches in Christmas displays, *Lynch,* 465 U.S. 668 (1984), *County of Allegheny*, 492 U.S. at 578; and citizens of the Second, Third, Fourth, Seventh, Eighth, Tenth, and Eleventh Circuits can challenge various government expressions of religious favoritism, *see* II below, but Navy chaplains have no standing in the District of Columbia to challenge their federal employer's undisputed denominational gerrymander.

This Court has not addressed the specific question of whether exposure to or contact with the federal government's Establishment Clause violation within a discrete community of employees injures those employees, providing them standing. The affirmative answer to that question underlies all recent Establishment Clause decisions and their logic. Ten Circuit Courts of Appeal addressing that question have answered it affirmatively, driven by the reasoning of this Court's definition of the injury gerrymandered religious preferences produce, the

twin messages of preference and prejudice. The D.C. Circuit is the egregious lone exception.

I. THE D.C. COURT OF APPEALS' DECISION IS CONTRARY TO AND A RADICAL DEPARTURE FROM THIS COURT'S ESTABLISHMENT CLAUSE AND STANDING PRECEDENT

Petitioners ask the Court to review and reverse the decision below that Petitioners, Non-liturgical Navy chaplains, have no standing to challenge their federal employer's well-established denominational gerrymander that illegally gave chaplain appointments and financial and other important benefits through illegal retention on active duty solely to Catholic clergy. The Decision held that Petitioners lacked standing because: (1) they had not suffered any direct personal injury in fact from their direct exposure to Respondents' challenged practice; (2) Petitioners suffered no injury from their direct and personal exposure to the Navy's message to Petitioners, "you are outsiders, not full members of the political community," emanating from its denominational gerrymander, contrary to *County of Allegheny,* 492 U.S. at 595 (quoting *Lynch,* 465 U.S. at 688 (O'Connor, J., concurring)); (3) the Navy's gerrymander did not communicate a message for the government; and (4) Petitioners lacked taxpayer standing.

Ten other Circuits, listed and discussed in II below, have rejected the Decision's reasoning and adopted the rule that "direct, offensive, and alienating contact with the [religious preference] program" provides a plaintiff with standing under the Establishment Clause to challenge the offending program or practice. *Americans United for the Separation of Church and State v. Prison Fellowship Ministries*, 509 F.3d 406, 419 (8th Cir. 2007) (citing Eighth Circuit precedent). Petitioners discuss this Court's Establishment Clause and standing precedent first because the Decision is contrary to that long-standing precedent, logic, reasoning, and definitions of Establishment Clause harm, which the ten Circuits' standing decisions follow.

A. The Decision Is Contrary to and Undermines this Court's Well-Established Precedent Defining Establishment Clause Injury as the Forbidden Messages the Government's Practice Communicates

The Decision conflicts with Establishment Clause precedents holding any government practice violating the First Amendment's mandate of religious neutrality is unconstitutional. *See Bd. of Ed. of Kiryas Joel Village Sch. Dist. v. Grumet*, 512 U.S. 687, 696, 699, 703 (1994); *McCreary County*, 545 U.S. at 860; *County of Allegheny*, 492 U.S. at 593-94; A-18-19,

24, 28-36 (dissenting). Establishing a benefit program for Catholics makes religion relevant to a person's standing in the chaplain community and is unconstitutional. *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 9 n.11 (1989), *County of Allegheny*, *op. cit.*

The Decision's reasoning and result conflict with *Larson v. Valente*, 456 U.S. 228, 244 (1982), specifically addressing a denominational gerrymander: "The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another." The Court has emphasized this Establishment Clause mandate and purpose in numerous cases, *e.g., id.* at 244; *County of Allegheny,* 492 U.S. at 591-94; *McCreary County*, *op. cit.* The undisputed fact is the Navy has done exactly what the Clause forbids. The 4109 chaplains are evidence and symbols of Petitioners' employer's illegal denominational preference. The Decision approves that preference by holding that chaplains from the Navy's disfavored sects have suffered no injury from Respondent's gerrymander, although they know about it and are exposed to it because they interact and work with the 4109 Program's illegally appointed chaplains. This violates two Establishment Clause principles.

1. The government's message of preference and prejudice produces Establishment Clause harm

City of Grand Rapids v. Ball, 473 U.S. 373, 390 (1985), adopted the rationale of Justice O'Connor's *Lynch* concurrence as the test for evaluating government practices allegedly violating the Establishment Clause. *County of Allegheny*, 492 U.S. at 597. This standard, based on the Establishment Clause's neutrality mandate, examines the message the government's practice communicates to determine if the practice makes religion relevant to a person's standing in the community. "Endorsement sends a message to non-adherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community." *Id.* at 595. The Court has used this standard in many subsequent cases, *e.g.*, *McCreary County*, *op cit.* Respondents' 4109 Program is not neutral, it "singles out a particular religious sect for special treatment," *Grumet*, 512 U.S. at 706, impermissibly making religion relevant to a chaplain's standing in the CHC community, *County of Allegheny*, 492 U.S. at 593-94, *see* A-34.

The endorsement test identifies the constitutional violation, thereby defining both the harm and the legally protected zone of interest,

because no harm means no violation. "[T]he pertinent liberty here is protection against government impartation of a ... religious preference." *Chaplaincy*, 454 F.3d at 302; *accord Larson*, 456 U.S. at 244, ("one religious denomination cannot be officially preferred over another"), 246 (same). That liberty interest is invaded when Respondents establish a practice making denomination relevant to a chaplain's standing in the political community. Respondents' denominational gerrymander, by definition, makes religion relevant because religion is the criteria for the award of benefits and communicates an unconstitutional message of favoritism to those preferred and discrimination to those not preferred. *See Larson*, 456 U.S. at 254 (statute drafted to exclude Catholic Church). The objects of the dual messages are self-evident: Catholics are favored, and Non-liturgicals are disfavored and prejudiced.

Respondents' willingness to break their own regulations to illegally appoint ineligible, over-age Catholic priests as chaplains and further break the law to enable them to obtain a pension is an overt act communicating clear messages of denominational favoritism and prejudice. The message is the harm. This simple definition of harm is consistent with the Clause's purpose because it expresses the core concepts of both the Establishment and Free Exercise Clauses – government neutrality in the area of religion and avoiding denominational conflicts.

2. Petitioners' claim arises in the context of a small community of religious leaders employed to provide religious services

Establishment Clause claims must be examined in the context in which they arise, and "courts must survey meticulously the circumstances of governmental categories to eliminate, as it were, religious gerrymanders." *Walz*, 397 U.S. at 696 (Harlan, J., concurring); A-33. This includes identifying the recipients of the unconstitutional messages, *e.g.*, those visiting the courthouse in *McCreary County*, and those attending high school football games in *Sante Fe Independent Sch. Dist. v. Doe*, 530 U.S. 290 (2000). The Decision incorrectly (1) holds Petitioners as unaffected and disinterested common citizens who only observe the government's unconstitutional action, A-16-17, and (2) concludes that Petitioners seek "to wedge open the courthouse door to a wide range of plaintiffs" previously barred, A-18, rather than carefully examine the context in which Petitioners' claim arises, government employees challenging their employer's constitutional violations. The context shows that Petitioners are the target of Respondents' unconstitutional message.

B. The Decision is Contrary to This Court's Standing Precedent

Federal standing requires that a "plaintiff must allege (1) that he has suffered an injury in fact (2) that is fairly traceable to the action of the defendant and (3) that will likely be redressed with a favorable decision." *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560-61 (1992). Petitioners met that standard because Respondents' denominational preference has invaded Petitioners' legal zone of interest of non-establishment and a court can enjoin the invasion.

1. The Decision improperly avoided controlling precedent

Faced with this Court's unbroken precedent holding that government actions violating the Establishment Clause send twin unconstitutional messages of preference and prejudice, the majority found those cases inapplicable by holding that this Court assumed standing *sub silentio* in *McCreary County*, *Allegheny*, and other precedents Petitioners cited. A-14-15. This is not only contrary to the facts, as shown below, but incorrectly assumes that both the lower courts first addressing those issues and this Court violated their duty to ensure that Article III jurisdiction existed. *See Warth v. Seldin*, 422 U.S. 490, 498 (1975) (standing "is the threshold question in every federal case").

The procedural history in every precedent the Decision cited as having no or questionable standing, A-14-15, shows the plaintiffs' standing was contested

and established in the courts below except *Engel v. Vitale*, 370 U.S. 421 (1962), reversing a Court of Appeals of New York decision where federal standing was not an issue. Years before the ACLU of Kentucky filed suit to enjoin the Ten Commandment display in the McCreary County courthouse, *Washegesic v. Bloomingdale Public Schools*, 33 F.3d 679, 683 (6th Cir. 1994), held the Sixth Circuit plaintiffs' direct exposure to or contact with governmental religious favoritism provided injury and standing. Citing *Washegesic*, *op cit.*, the *McCreary County* district court found that "the plaintiffs had standing because they must come into contact with the display of the Ten Commandments when they enter the courthouse to conduct business." *ACLU of Ky. v. McCreary County*, 96 F.Supp.2d 679, 682 (E.D.Ky. 2000).

The *County of Allegheny* plaintiffs sued as taxpayers, *see ACLU, Greater Pittsburgh Chapter v. County of Allegheny*, 842 F.2d 655, 656 (3d Cir. 1988), *aff'd in part and rev'd in part*, 492 U.S. 573 (1989), but exposure to the challenged display would have established the *Allegheny* plaintiffs' standing under current Third Circuit precedent. The Third Circuit affirmed the *Freethought Society v. Chester County's* holding that unwelcome exposure to an Establishment Clause violation gave a plaintiff standing, 191 F.Supp.2d 589, 593 (E.D. Pa. 2002), *aff'd*, 334 F.3d 247, 255 n.3 (3d Cir. 2003).

Suhre v. Haywood County, 131 F.3d 1083, 1086 (4th Cir. 1997), reversed the district court's dismissal for lack of standing, holding that direct, unwelcome contact with a government religious display provided standing. *Lee v. Weisman*, involving a parent's challenge to a graduation prayer, found standing under the holding of *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 229 n.9 (1962), that the interests of "school children and parents who are directly affected by the [challenged laws and practices] ... surely suffices to give the parties standing to complain." The district court in *Marsh v. Chambers*, 463 U.S. 783 (1983), rejected challenges to the plaintiff's standing as a legislator directly affected by the challenged chaplain/prayer practice and a taxpayer, and the Eighth Circuit affirmed. *See Chambers v. Marsh*, 504 F.Supp. 585, 591 n.14 (D.C. Neb. 1980), *aff'd*, 675 F.2d 228 (8th Cir. 1980). The First Circuit rejected the defendants' standing challenge to the *Lynch v. Donnelly* plaintiffs' taxpayer standing. *See Donnelly v. Lynch*, 691 F.2d 1029, 1030-1032 (1st Cir. 1982) *rev'd on other grounds*, 465 U.S. 668 (1984). No justice, including dissenters, has challenged or raised standing as an issue in any Establishment Clause precedent since *Larson*. The ready availability of the facts and case history show that the Decision's standing assumption concerning this Court's precedent was unfounded.

Especially troubling is the Decision's holding that Petitioners had no standing, even if their

allegations of Establishment Clause violations were true. A-6. Who can challenge the Respondents' undisputed denominational gerrymander and what is Stewart's and other Petitioners' Establishment Clause zone of interest? The Decision overrules *Chaplaincy's* holding that Petitioners' interest includes not having the Navy establish a denominational preference and not being told daily they were second class citizens through personal contact with 4109s like Chaplain Erestain, 454 F.3d at 302.

2. Petitioners have been exposed to and injured by Respondents' denominational gerrymander and preference

As Judge Rogers noted, Petitioners are members of a small Navy community called the Chaplain Corps, A-26, 37. It has fewer than a thousand chaplains. Petitioners' complaints identify the Navy's practice of hiring priests beyond the regulatory age limits and retaining them beyond statutory separation ages, and alleges that this violates the Establishment Clause.

As Petitioners explained to the District Court and also in *Chaplaincy*, the Navy listed the 4109s in various CHC public documents, *e.g.*, Alfa Rosters, which Petitioners used to identify the 4109s, A-24 n.4, and other over-age priests who were illegally appointed. Petitioners identified the illegally

appointed chaplains not yet granted 4109 status through documents produced in discovery. *Id.* These over-age priests are not assigned to isolated places. Petitioner Stewart is a prime example of the very personal exposure to and injury flowing from the challenged practice that necessarily takes place in the small Chaplain Corps community. Stewart's assignment to Bethesda Naval Medical Center brought him into daily personal contact with 4109 Catholic LCDR Erestain. *Id.* Stewart knew that Erestain was illegally appointed, maintained, and retained on active duty solely because he was Catholic, yet Stewart's duty did not allow him to avoid contact with Erestain, a living symbol and message of the Navy's Catholic preference.

The Decision made no mention of Petitioner Stewart's daily exposure to 4109 Erestain. To say Stewart and other Petitioners were and are not exposed to or come in contact with the Respondents' denominational preference or gerrymander is a case of willful blindness. Judge Rogers pointed out:

> Appellants ... are not strangers to the Navy's 4109 program. Their membership within the Chaplain Corps and the resulting receipt of a message of denominational preference makes them comparable to a citizen who has "personal contact with the alleged

> establishment of religion," such as in the religious display cases.

A-24-25 (quoting *Suhre*, 131 F.3d at 1086.)

The CHC classifies chaplains on the basis of their faith groups, and chaplains know each others' denominations because chaplains perform distinct religious services. The CHC has identified its chaplains' faith groups by special codes in its chaplain rosters, directories, and lists. It was no secret that Erestain was a 4109, illegally assessed and continued only because he was Catholic. This "conveys an unmistakable message of endorsement to the reasonable observer." *McCreary County*, 545 U.S. at 884 (O'Connor, J., concurring).

This Court has recognized that racial prejudice affecting a distinct community provides its residents standing. *Gladstone Realtors v. City of Bellwood*, 441 U.S. 91, 114 (1979); *Hovens Realty Corp. v. Coleman*, 455 U.S. 363, 377 (1982). There is no dispute that the Chaplain Corps is a small, discrete community within the Navy, or that the Navy's 4109 Program created a denominational preference within that community. A-26, 28 n.7. The Decision provides no reason why racial prejudice in a community provides standing for its residents but chaplains have no standing to challenge religious preferences, prejudice, and gerrymanders in their small chaplain community.

3. The Decision is contrary to the precedent holding that the invasion of Petitioners' legally protected non-establishment interest provides standing

The Court of Appeals, finding that Petitioners had not suffered an injury, forgot the well- established legal principle that "injury in fact" includes an "invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical." *Lujan,* 504 U.S. at 560. *Chaplaincy*, 454 F.3d at 302, defined that interest in accord with this Court's precedent and the Clause's purpose, "protection against [the Navy's] imposition of a ... religious preference" and its message of marginalization and prejudice, *id.*, which also implicates the Fifth Amendment.

Before the court was undisputed evidence of the Navy's denominational gerrymander, a clearly forbidden endorsement of a single denomination, which in and of itself is a forbidden invasion of Petitioners' legally protected interests. "Endorsement sends a message to non-adherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community." *McCreary County*, 545 U.S. at 860. Petitioners are the non-adherents, the target of the Navy's messages of prejudice and second class

citizenship which invade "the zone of interests to be protected or regulated by the ... constitutional guarantee in question," the prohibition of the government establishment of religion. *See Ass'n of Data Processing Serv. Org., Inc. v. Camp,* 397 U.S. 150, 153 (1970).

The Decision ignores the simple, undisputed fact that Respondents created a denominational gerrymander, and "the [Respondents'] action itself bespoke the purpose," *McCreary*, 545 U.S. at 862. The very presence of a 4109 chaplain in "a narrowly defined community," A-37, communicates "a religious message through ... religious symbols," *see* A-B, and that message to Petitioners is loud and clear, "The Navy prefers Catholics, and you Non-liturgicals are fourth class citizens."[6] *See Chaplaincy*, 454 F.3d at 302.

The Decision fails to explain how a license plate communicates a government message, *Wooley v. Maynard*, 430 U.S. 705 (1977), and a student's arm band is symbolic speech, *Tinker v. Des Moines Indep. Comm. Sch. Dist.*, 393 U.S. 503 (1969), but a 4109

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[6] Plaintiffs' evidence shows that in every personnel area which can be measured by data, the Navy has established a denominational hierarchy of preference with Catholics first, Liturgical Protestants second, and Non-liturgicals behind Special Worship in most categories.

chaplain does not display the Navy's preference for Catholics through its illegal 4109 program. "[G]overnment action that draws a line around a religious denomination in a community can send a symbolic message of preference that needs no words just as easily as the government's direct presentation of a religious symbol." A-33.

4. The Decision's avoidance of precedent creates a safe haven for religious discrimination

The Decision's holding that Stewart and Petitioners were not harmed personally and individually, A-6, ignoring their contact with 4109s like Erestain (not mentioned), follows from its illogical distinguishing of this Court's religious symbols and prayer precedents to avoid addressing the 4109 Program's three parts, purpose, and message. The Decision held that the symbols in those cases spoke for the government but the 4109 chaplains did not. A-15-16. This has no support in and is contrary to Establishment Clause jurisprudence. Some religious symbols are passive, *e.g.*, a creche, *Lynch*, 465 U.S. at 685 ("The creche, like a painting, is passive"), others are living, like the legislative chaplain in *Marsh v. Chambers*, 463 U.S. 783 (1983), or "state paid instructors," *Ball*, 473 U.S. at 397, creating a "graphic symbol of the [church-state fusion]", *id.* at 391 (cited and overturned in *Agostini v. Felton*, 521 U.S. 203 (1997)). *See also Kleppe v. New Mexico*, 426

U.S. 529, 535 (1976) ("free-roving horses and burros are living symbols"). If passive mute symbols speak for the government, how much more persons with voices? Whether passive or active, the question is the "effect," the message the religious symbol communicates, because the symbol reflects a government decision, action or practice.

> Since *Lynch,* the Court has made clear that, when evaluating the effect of government conduct under the Establishment Clause, we must ascertain whether "the challenged governmental action is sufficiently likely to be perceived by adherents of the controlling denominations as an endorsement, and by the nonadherents as a disapproval, of their individual religious choices."

County of Allegheny, 492 U.S. at 597 (quoting *Ball*, 473 U.S. at 390).

Ten Circuit precedents in II below hold that exposure to or contact with a religious display creates standing. However, the D.C. Circuit finds no standing when the evidence of government preference is a living chaplain, illegally appointed as a chaplain and illegally continued on active duty, who breathes and requires a salute, undermining *McCreary County* and *County of Allegheny*. The D.C. Circuit's unique

holding making a constitutional difference between passive, mute religious symbols and 4109 Erestain (other 4109s and potential 4109s), living evidence of the Navy's religious preference program, creates an anomaly without legal support and undermines this Court's emphasis on precedent.

> We must strive to do more than erect a constitutional "signpost," to be followed or ignored in a particular case as our predilections may dictate. Instead, our goal should be "to frame a principle for constitutional adjudication that is not only grounded in the history and language of the first amendment, but one that is also capable of consistent application to the relevant problems."

Wallace v. Jaffree, 472 U.S. 38, 69 (1985) (O'Conner, J., concurring) [citations omitted]; *see also Agostini,* 521 U.S. at 237 (Circuit Courts must follow precedent).

The Decision has created a safe haven for religious prejudice and an anomaly in standing precedent by failing to recognize the harm resulting from Respondents' message of second class citizenship their denominational gerrymander communicates to petitioners. In effect, this insulates government practices such as the one challenged here from judicial review in the District of Columbia, although

available in every other district court. Standing to challenge an Establishment Clause violation should not depend on the Circuit to which one is transferred.[7] Here, a facially clear denominational preference exists.

The Decision creates an anomaly in standing because this Court has recognized standing for such diverse and non-financial interests as recreational, environmental, and aesthetic interests, and in the civil rights context, "missed business and professional advantages which would have accrued if [plaintiffs] had lived with members of minority groups" and "embarrassment and economic damage and social, business and professional activities from being stigmatized as residents of a 'white ghetto.'" *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205, 208 (1972). However, the Decision fails to recognize Petitioners' interest in not being subjected to unconstitutional messages of discrimination and second class citizenship, and stigmatized because Respondents view Petitioners, in effect, as members of a religious ghetto. This makes the Establishment Clause and this Court's interpretation of its mandate ineffectual in the District of Columbia. This is hardly equal protection under the law and conflicts with the judiciary's duty to defend the Establishment Clause from major and minor encroachments.

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[7] The *Gibson* plaintiffs filed suit in Florida to avoid the D.C. Circuit's review of their claims.

C. The Decision Creates a Legal Catch-22 by Differentiating Between Irreparable Harm for an Injunction and the Direct Injury Necessary to Have Standing

Chaplaincy, 454 F.3d at 298, recognized that Petitioners' claimed actual injuries included reduced promotion opportunity because vacancies in the next higher grade determine promotions and Respondents' 4109 program kept chaplains on active duty who should have been discharged. *Chaplaincy* held that such injury was not irreparable harm because eventually money damages would compensate any such harm, *id.* The irreparable harm was the twin messages of preference and prejudice. *Id.* at 302. The same court which found that Petitioners suffered irreparable injury now holds they have suffered *no injury* in fact from the same claim *Chaplaincy* addressed, *see* A-21. The same denominational preference cannot simultaneously cause Petitioners irreparable harm and be insufficient to confer standing due to the high standard for irreparable harm. *Id.* (quoting *Chaplaincy,* 454 F.3d at 297).

The Decision suggests that Petitioners' tangible injuries, *e.g.*, reduced promotion opportunity, which *Chaplaincy* rejected as irreparable harm, 454 F.3d at 298, would provide standing. This is irrational and conflicts with the Court's irreparable harm and the

First Amendment standing precedent. *Elrod v. Burns*, 427 U.S. 342, 373-74 (1976), found that government employees suffered irreparable harm because their First Amendment rights were either threatened or were in fact being impaired. Those employees suffered tangible harm from lost wages that would have eventually been restored, yet the Court found that the alleged First Amendment violation caused irreparable harm sufficient for an injunction. The same challenged government action challenged under the Establishment Clause cannot result in irreparable harm and yet be insufficient harm for standing. The Decision is irreconcilable with this Court's precedent and *Chaplaincy*.

II. THE DECISION IS CONTRARY TO TEN OTHER CIRCUITS HOLDING THAT EXPOSURE TO GOVERNMENT "ESTABLISHMENT" PROVIDES STANDING

Ten Circuits, all except the D.C. Circuit, have found that a plaintiff's unwelcome contact with or exposure to the government's manifestation of religious preference provides standing to raise an Establishment challenge, including plaintiffs whose duties do not allow them to avoid such contact, *e.g.*, Petitioner Stewart. The First Circuit has no case on point, but its decision affirming taxpayer standing to challenge a Christmas display in *Lynch*, 691 F.2d at 1030-1032, suggests that it, too, would agree with the

other ten Circuits holding that exposure to or contact with a government's alleged establishment of religion provides sufficient injury to give plaintiffs standing to challenge the practice.

The chart below lists some of these decisions in each Circuit.

CIRCUIT DECISIONS HOLDING DIRECT EXPOSURE TO GOVERNMENT'S RELIGIOUS FAVORITISM[8] PROVIDES STANDING

Circuit	Citation
First	No case on point
Second	*Altman v. Bedford Central School Dist.*, 245 F.3d 49, 72 (2nd Cir.), *cert denied*, 539 U.S. 827 (2001)
Third	*Freethought Society v. Chester County*, 191 F.Supp.2d 589, 593 (E.D. Pa. 2002), *affd*, 334 F.3d 247, 255 n.3 (3d Cir. 2003)
Fourth	*Suhre v. Haywood County*, 131 F.3d 1083, 1087-88 (4th Cir. 1997)

[8] Each of the cases involved exposure to a symbol or practice indicating the government favored one religious viewpoint, symbol or belief, sometimes favoring religion over non-religion.

Fifth	*Murray v. City of Austin*, 947 F.2d 147, 151 (5th Cir. 1991); *Littlefield v. Forney Ind. Sch. Dist.*, 268 F.3d 279, 294 (5th Cir. 2001)
Sixth	*Washegesic v. Bloomingdale Public Sch.*, 33 F.3d 679, 683 (6th Cir. 1994)
Seventh	*Doe v. County of Montgomery*, 41 F.3d 1156, 1160-61 (7th Cir. 1994)
Eighth	*ACLU Neb. Found. v. City of Plattsmouth*, 358 F.3d 1020, 1030 (8th Cir. 2004), *adopted by court en banc*, 419 F.3d 772, 775 n.4 (8th Cir. 2005)
Ninth	*Buono v. Norton*, 371 F.3d 543, 547-48 (9th Cir. 2004); *Vasquez v. Los Angeles County*, 487 F.3d 1246, 1251 (9th Cir.), *cert denied*, 128 S.Ct. 711 (2007)
Tenth	*Foremaster v. City of St. George*, 882 F.3d 1485, 1490-91 (10th Cir. 1989), *cert denied*, 495 U.S. 910 (1990)
Eleventh	*Saladin v. City of Milledgeville*, 812 F.2d 687, 690 (11th Cir. 1987)

The above cases distinguish *Valley Forge* because the plaintiffs had direct personal contact with the challenged action and were vindicating their own rights, like these Petitioners. Most Circuit decisions follow a variation of the endorsement test: does the

challenged action have "the effect of endorsing or disapproving religious beliefs?" *County of Allegheny*, 492 U.S. at 597. The *Saladin* plaintiffs (11th Circuit), challenging the word "Christianity" in the City seal, "alleged that the city seal denigrated their personal and philosophical beliefs and made them feel like second class citizens." 812 F.2d at 689. The plaintiffs' "direct contact with the offensive conduct" on City stationery or seeing City property display the seal provided injury. *Id.* at 692. "The complaint asserts that the presence of the word on the seal offends the appellants because the seal represents the City's endorsement of Christianity and thus makes the appellants feel like second class citizens." *Id.* at 692-93.

There is a significant and critical difference between the cited Circuit cases' standing approach and the Decision's. The Circuit cases found that *School Dist. of Abington Twp., Pa. v. Schempp*, 374 U.S. 203 (1963), and *Valley Forge* provided authority for holding that direct contact with challenged Establishment Clause violations provided standing. *Schempp* specifically addressed the standing question.

> It goes without saying that the laws and practices involved here can be challenged only by persons having standing to complain. *** The parties here are school children and their parents, who are directly affected by the laws and

> practices against which their complaints are directed. These interests surely suffice to give the parties standing to complain.

Schempp, 374 U.S. at 225 n.9.

"[L]ike *Schempp* before it, *Valley Forge* recognized that direct contact with an unwelcome religious exercise or display works a personal injury distinct from and in addition to each citizen's general grievance against unconstitutional government conduct." *Suhre*, 131 F.3d at 1086 (citing *Valley Forge,* 454 U.S. at 487 n. 22 (discussing *Schempp*)). The Circuit cases distinguish between plaintiffs having "direct contact with an unwelcome religious exercise or display that works a personal injury" and those with "absolutely no personal contact with the alleged establishment of religion." *Id.* (comparing Circuit cases). This is significantly different from the Decision's approach, completely ignoring Stewart's direct contact with Erestein or the impact on other Petitioners' exposure to 4109s and encountering evidence of them in various documents and lists.

The other Circuits embrace Judge Rogers' view concerning the impact of the Navy's denominational preference in the small CHC community, A-24-27, 37.

> The circuits ... recognized that "the practices of our own community may

> create a larger psychological wound than someplace we are just passing through." *Washegesic*, 33 F.3d at 683. Plaintiffs who "are part of the community where challenged religious symbolism is located and are directly affronted by the presence of this symbolism" certainly "have more than an abstract interest in seeing that the government observes the Constitution." *Saladin*, 812 F.2d at 693.

Suhre, 131 F.3d at 1086. In contrast, the Decision totally ignores the community, the context in which the Navy's denominational gerrymander exists and in which the Navy broadcasts its messages of prejudice and preference.

The Decision ignored *Schempp*'s clear holding concerning both injury and standing and *Valley Forge's* affirmance of *Schempp*, placing the Decision in clear conflict with this Court's directives to follow precedent that speaks to the case at hand, *Agostini*, 521 U.S. at 237. *Schempp*, properly applied with this Court's definition of Establishment Clause injury, provides Petitioners with standing because of their direct contact with the Navy's establishment of religion, consistent with the ten Circuits' holdings addressing the issue.

III. THE DECISION CONFLICTS WITH THE SECOND CIRCUIT'S HOLDING THAT TAXPAYERS HAD STANDING UNDER *FLAST v. COHEN* TO CHALLENGE CONGRESS' AUTHORITY TO FUND CHAPLAINS

The only prior constitutional challenge to a military chaplain corps was *Katcoff v. Marsh*, 582 F.Supp. 463 (1984), *aff'd in part, rev'd in part*, 755 F.2d 223 (2d Cir.1985). Two law student plaintiffs challenged the Army Chaplain Corps' constitutionality. The district court found they had taxpayer standing, but following the 1982 *Valley Forge* decision, the Army again challenged the students' standing. *Id.* at 467. The district court again found that plaintiffs had standing under *Flast v. Cohen* 392 U.S. 83 (1968), *U.S. v. Richardson*, 418 U.S. 166 (1974), and *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208 (1974). These are the same cases affirmed by *Hein v. The Freedom from Religion Foundation, Inc.*, 127 S.Ct. 2553 (2007), upon which the lower courts relied, *see* A-8-12 and A-54, to deny Petitioners' taxpayer standing. The Second Circuit affirmed the plaintiffs' standing, *Katcoff*, 755 F.2d at 231. Petitioners structured their claim for taxpayer standing on *Katcoff's* holding.

Like the *Katcoff* plaintiffs, Petitioners' "challenge here is to that portion of the overall congressional appropriation for the [Navy] that is

used for the operation and maintenance of the Chaplaincy Program." 582 F.Supp. at 470. This is not "an incidental expenditure of tax funds in the administration of an essentially regulatory statute," *id.* (citing *Flast*, 392 U.S. at 102), and "[w]hatever additional powers Congress may have exercised in passing the [Navy] budget, which includes funds for the program, it clearly exercised its constitutional authority to spend." As in *Katcoff*, Petitioners challenge Congress' continued appropriation and funding for Navy chaplains who have been illegally accessed, maintained, and retained on active duty for the purpose of illegally qualifying for military pensions. The Navy's discriminatory message communicated by its illegal denominational preference is aimed at Petitioners, providing a "logical link between that status and the type of legislative enactment attacked." *Flast,* 393 U.S. at 103. "Appellants have alleged that the challenged expenditures violate the Establishment and Free Exercise Clauses of the First Amendment." *Id.* The Decision creates the anomaly that law students can challenge a chaplaincy program under *Katcoff* and *Flast* in the Second Circuit, *Katcoff*, 755 F.2d at 231, but these Navy chaplains, the target of Respondents' prejudicial message and directly affected and injured by Respondents' actions, cannot do so in the District of Columbia.

IV. THE DECISION IGNORES AND UNDERMINES THIS COURT'S LONG STANDING DIRECTIVES THAT COURTS MUST ENSURE THAT PRACTICES CHALLENGED UNDER THE ESTABLISHMENT CLAUSE DO NOT ALLOW THE EVILS THAT CLAUSE WAS DESIGNED TO PROHIBIT

A. The Court of Appeals Failed to Examine Respondents' Denominational Preference and Protect Establishment Clause Values

> [O]ur cases require [] careful examination of any law challenged on establishment grounds with a view to ascertaining whether it furthers any of the evils against which that Clause protects. Primary among those evils have been "sponsorship, financial support, and active involvement of the sovereign in religious activity."

Nyquist, 413 U.S. at 794 (1973) (quoting *Walz*, 397 U.S. at 668; *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971)), *see County of Allegheny*, 492 U.S. at 609 (citing "the unwavering vigilance that the Constitution requires" against any violation of the Establishment Clause). Despite the Court's clarity in

defining the judiciary's duty, this case's procedural and factual history show a consistent failure of the lower courts to follow this Court's directives and squarely address this unique situation, the government's establishment of an unquestioned and unjustified gerrymander/denominational preference. The undisputed practice provides financial support to one denomination by allowing its illegally appointed chaplains to qualify for pensions. Absent their illegal appointment, their church would have to provide for the healthcare and retirement of these elderly clergy. The Court is asked to take judicial notice that the older one gets, the more his health care costs increase.

The Decision's holding that Petitioners have no standing even if their allegations of Establishment Clause violations were true, A-6, exemplifies its disregard for precedent. Respondents do not deny their practice exists or benefits only Catholics. Under the Decision's logic, CH Stewart, Petitioners, or any other plaintiffs can never vindicate the invasion of their Establishment Clause interest despite egregious Establishment Clause violations. The Decision legalizes Respondents' daily message of second class citizenship to Petitioner Stewart through his personal contact with 4109 CH Erestain. This truly makes Petitioners second class citizens when compared to the citizens of Austin, Texas, or the City of St. George, New Mexico, who could challenge a cross in their City Seal, or the attorney in McCreary County, Kentucky, injured by the courthouse's Ten Commandment

display. This significant difference raises due process and right to petition issues. No prior case has allowed a government agency to establish the perfect denominational gerrymander, perfect because it excludes all but Catholics from its program, ensuring that no non-Catholic can be denied extension beyond the statutory age limits, which the courts below held is the only way Petitioners could be injured. This allows the Navy to be a law unto itself, echoing Justice Brandeis' dissent in *Olmstead v. U.S.*, 277 U.S. 438, 468 (1928):

> In a government of laws, existence of the government will be imperiled if it fails to observe the law scrupulously. Our government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy.

The Decision destroys governmental accountability and grants the Navy license to ignore its own regulations, statutes and the Constitution. As Judge Rogers concluded, Petitioners' injunction seeks only to force the Navy to follow the law, end ing its religious gerrymander. A-28-29 and n.7.

B. The Court of Appeals Improperly Failed to Issue an Injunction to Stop Undisputed Irreparable Harm

Before the Court of Appeals was undisputed evidence Respondents had established and maintained a denominational gerrymander for more than 30 years. Petitioners brought their initial motion in 2003 and were on their second appeal in 2008. Neither the District Court nor the Decision addressed the fact Respondents' over-age Catholic appointments violated their own regulations, making the appointments illegal; the Court of Appeals required no further findings to issue an injunction.

The Court of Appeals also ignored the District Court's long delays in ruling before and after *Chaplaincy*'s precedent establishing Petitioners' irreparable harm. In the motion's three briefings in the District Court and two Appellate briefs, Respondents had (1) provided no legitimate authority to justify violating their own regulations and statutes; (2) provided no compelling purpose for their preference or illegal actions; and (3) established no close fit between means and objective, *i.e.*, narrow tailoring. *See* A-35 (Judge Rogers noting "the absence of a legitimate explanation" for the challenged practice). If Petitioners have standing, strict scrutiny applies: "*Larson* teaches that, when it is claimed that a denominational preference exists, the initial inquiry is whether the law facially differentiates among

religions. If no such facial preference exists, we proceed to apply the customary three-pronged Establishment Clause inquiry derived from *Lemon v. Kurtzman*, 403 U.S. 602 (1971)," *Hernandez v. C.I.R.*, 490 U.S. 680, 695 (1989). If strict scrutiny applies, only one result is possible: Petitioners will prevail on the merits because Respondents have failed to meet their burden to show a compelling purpose or narrow tailoring after five years, three briefings, and two appeals. When "the record permits only one resolution of the factual issue," an appellate court may issue an injunction. *Pullman-Standard v. Swint*, 456 U.S. 273, 292 (1982) [citation omitted].

Failure to issue an injunction is incompatible with its purpose, to minimize irreparable harm by restoring the status quo ante, stopping the practice causing the harm. Issuing the injunction will establish strict scrutiny as the law of the case for denominational preferences in the District of Columbia, something the District Court has refused to do. *Adair v. England*, 416 F.Supp.2d 1 (D.D.C. 2006), refused to apply strict scrutiny to Respondents' 26-year practice reserving at least one career promotion board membership for a Catholic on every chaplain career promotion board, a privilege granted to no other denomination. Evidence shows the preference benefitted Catholics and prejudiced Petitioners.

Failure to issue an injunction ignores the duty *Nyquist* articulated for the courts: prevent

Establishment Clause violations. Delay only continues irreparable harm, allowing more illegally appointed Catholic chaplains to qualify for taxpayer-funded retirements.

CONCLUSION

The Decision is a radical departure from this Court's Establishment Clause and standing precedent and the ten other Circuits' decisions addressing the issue, whether plaintiffs' direct personal contact with government establishment of religion provides standing.

After nine years of litigation challenging religious preferences and five years addressing an uncontested and overt religious gerrymander for the benefit of over-age Catholics, the District of Columbia has rejected the Establishment Clause's basic command, that government not officially prefer one denomination above others. Petitioners respectfully request the Court issue a writ of certiorari to review and correct the Decision's serious deviation from the Court's precedents, aligning the Decision with all other Circuit Courts which hold personal contact with government establishment of religion provides standing.

Respectfully submitted,

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No. _____

In The Supreme Court of the United States

IN RE NAVY CHAPLAINCY;

CHAPLAINCY OF FULL GOSPEL CURCHES, ET AL.,
Petitioners,

v.

UNITED STATES NAVY, ET AL.,
Respondents.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the
District of Columbia Circuit

APPENDIX

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United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued April 24, 2008 Decided August 1, 2008

No. 07-5359

IN RE: NAVY CHAPLAINCY

CHAPLAINCY OF FULL GOSPEL CHURCHES, ET AL.,
APPELLANTS

V.

UNITED STATES NAVY, ET AL.,
APPELLEES

Appeal from the United States District Court
for the District of Columbia
(No. 07ms00269)

Arthur A. Schulcz, Sr., argued the cause and filed the briefs for appellants.

Lowell V. Sturgill, Jr., Attorney, U.S. Department of Justice, argued the cause for appellees. With him on the briefs were *Jeffrey S. Bucholtz*, Acting Assistant Attorney General, *Jeffrey A. Taylor*, U.S.

Attorney, and *Robert M. Loeb*, Attorney. *Daniel E. Bensing*, Attorney, entered an appearance.

Before: ROGERS and KAVANAUGH, *Circuit Judges*, and SILBERMAN, *Senior Circuit Judge*.

Opinion for the Court filed by *Circuit Judge* KAVANAUGH, in which *Senior Circuit Judge* SILBERMAN joins.

Dissenting opinion filed by *Circuit Judge* ROGERS.

KAVANAUGH, *Circuit Judge*: A group of Protestant Navy chaplains sued the Navy, alleging that the Navy's operation of its retirement system discriminates in favor of Catholic chaplains in violation of the Establishment Clause. But the plaintiffs do not claim that the Navy actually discriminated against any of them. We conclude that plaintiffs lack standing to bring this claim, and we therefore affirm the judgment of the District Court.

I

The U.S. Navy maintains a Chaplain Corps of commissioned Navy officers to meet the spiritual needs of those who serve in the Navy and their families. Like other officers, chaplains are subject to military regulations with respect to hiring, promotion, and retirement.

The Navy divides its chaplains into four categories-Catholic, liturgical Protestant, non-liturgical Protestant, and Special Worship. As we explained in a previous opinion in this litigation, "liturgical Protestant" includes Protestant denominations that follow an established liturgy in worship services and practice infant baptism, such as Lutheran, Episcopal, Methodist, Presbyterian, and Congregational. *Chaplaincy of Full Gospel Churches v. England,* 454 F.3d 290, 294 (D.C.Cir.2006) (*Chaplaincy*). "Non-liturgical Protestant" includes Protestant denominations that do not follow a formal liturgy in worship services and that baptize at the age of reason, such as Baptist, Evangelical, Pentecostal, and Charismatic. *Id.* at 294. The "Special Worship" category refers to other religious faiths, both Christian and non-Christian, and it includes Jewish, Christian Science, Seventh-Day Adventist, Mormon, Buddhist, Hindu, Muslim, Jehovah's Witness, and Unitarian. *Id.* at 295 n. 3.

Plaintiffs are non-liturgical Protestant Navy chaplains, both current and retired.[1] Plaintiffs filed

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[1] Plaintiffs also include certain organizations of non-liturgical Protestant chaplains. Because the organizations have standing in these circumstances only if one of their individual members has standing, we do not address them separately. *See Hunt v. Washington State Apple Adver. Comm'n,* 432 U.S. 333, 342-43

suit, alleging that the Navy discriminates in favor of Catholic chaplains in certain aspects of its retirement system. *See In re Navy Chaplaincy,* 516 F.Supp.2d 119, 121 (D.D.C.2007). Plaintiffs also sought a preliminary injunction.

The District Court initially denied plaintiffs' preliminary injunction motion, finding that the chaplains had not shown the necessary irreparable injury to support a preliminary injunction. *See Adair v. England,* Nos. 00-cv-566 & 99-cv-2945, slip op. at 2 (D.D.C. Feb. 7, 2005). On appeal, this Court reversed, explaining that, for purposes of a preliminary injunction, the allegation of an Establishment Clause violation itself demonstrates sufficient harm to satisfy the irreparable injury prong of the preliminary injunction test-assuming, of course, that the party has standing to allege the violation in the first place. *See Chaplaincy,* 454 F.3d at 303-04 & n. 8. The Court therefore vacated the denial of a preliminary injunction and remanded for the District Court to consider the remaining factors in the preliminary injunction analysis, including likelihood of success on the merits. *See id.* at 304-05.

On remand, in a well-reasoned opinion, the District Court concluded that plaintiffs lacked standing to bring this claim. This appeal followed.

(1977).

II

Article III of the Constitution limits the judicial power to deciding "Cases" and "Controversies." "One of the controlling elements in the definition of a case or controversy under Article III is standing." *Hein v. Freedom From Religion Foundation, Inc.*, 127 S.Ct. 2553, 2562 (2007) (internal quotation marks and alteration omitted).[2] The three factors establishing the "irreducible constitutional minimum" of standing are well established. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). First and most relevant here is injury-in-fact: A would-be plaintiff must have suffered "an invasion of a legally protected interest" that is (i) "concrete and particularized" rather than abstract or generalized,and (ii) "actual or imminent" rather than remote, speculative, conjectural or hypothetical. *Id.* (internal quotation marks omitted); *see also Pub. Citizen, Inc. v. Nat'l Highway Traffic Safety Admin.*, 489 F.3d 1279, 1292-93 (D.C.Cir.2007). Second is causation: The asserted injury must be "fairly traceable to the challenged action of the defendant." *Lujan*, 504 U.S. at 560 (internal quotation marks and alterations omitted). Third is redressability: It must be likely that a favorable decision by the court would redress the

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[2] In referring to *Hein* throughout our opinion, we are referring specifically to Justice Alito's opinion, which is the binding opinion of the Court in that case. *See Marks v. United States*, 430 U.S. 188, 193 (1977).

plaintiff's injury. *Id.* at 561.

"[T]he law of Art. III standing is built on a single basic idea-the idea of separation of powers." *Allen v. Wright,* 468 U.S. 737, 752 (1984). The doctrine is "founded in concern about the proper-and properly limited-role of the courts in a democratic society." *Warth v. Seldin,* 422 U.S. 490, 498 (1975). The federal courts are "not empowered to seek out and strike down any governmental act that they deem to be repugnant to the Constitution." *Hein,* 127 S.Ct. at 2562. "Vindicating the *public* interest (including the public interest in Government observance of the Constitution and laws) is the function of Congress and the Chief Executive." *Lujan,* 504 U.S. at 576; *see also Valley Forge Christian Coll. v. Americans United for Separation of Church & State, Inc.,* 454 U.S. 464, 474-75 (1982).

Those critical and bedrock principles of separation of powers inform our approach to plaintiffs' claim.

III

In reviewing the standing question, we must be "careful not to decide the questions on the merits for or against the plaintiff, and must therefore assume that on the merits the plaintiffs would be successful in their claims." *City of Waukesha v. EPA,* 320 F.3d 228, 235 (D.C.Cir.2003). For purposes of our analysis in this case,

we therefore must assume arguendo that the Navy's operation of its retirement system favors Catholic chaplains and disfavors non-liturgical Protestant chaplains in violation of the "clearest command of the Establishment Clause"-that "one religious denomination cannot be officially preferred over another." *Larson v. Valente,* 456 U.S. 228, 244, (1982). Even assuming that plaintiffs' allegations are accurate, however, they do not have standing to bring this claim against the Navy because they have not sufficiently demonstrated their own injury-in-fact.

If plaintiffs had alleged that the Navy discriminated against them on account of their religion, plaintiffs would have alleged a concrete and particularized harm sufficient to constitute injury-in-fact for standing purposes. But plaintiffs have conceded that they themselves did not suffer employment discrimination on account of their religion. They have conceded that the Navy did not deny them any benefits or opportunities on account of their religion. *See In re Navy Chaplaincy,* 516 F.Supp.2d 119, 124-26 (D.D.C.2007). Rather, they suggest that *other* chaplains suffered such discrimination.

Plaintiffs argue that they nonetheless have standing for either of two reasons: (i) they are taxpayers who object to the Navy's allegedly discriminatory operation of its chaplaincy program, or (ii) they have been subjected to the Navy's "message" of religious preference as a result of the Navy's running a

retirement system that favors Catholic chaplains. We disagree. Because plaintiffs' claim does not fit within the narrow confines of Establishment Clause taxpayer standing permitted by *Flast v. Cohen,* 392 U.S. 83 (1968), they do not have standing as taxpayers. *See Hein v. Freedom From Religion Foundation, Inc.,* 127 S.Ct. 2553, 2562-72 (2007). Nor do plaintiffs have standing based on their exposure to the Navy's alleged "message" of religious preference.

A

As the Supreme Court has repeatedly held, a taxpayer's interest in ensuring that appropriated funds are spent in accordance with the Constitution does not suffice to confer Article III standing. *See Hein,* 127 S.Ct. at 2563 (2007). Back in *Frothingham v. Mellon,* 262 U.S. 447 (1923), taxpayers sued the Government, arguing that the Maternity Act of 1921 improperly invaded powers reserved to States by the Tenth Amendment. The Supreme Court rejected taxpayer standing in that case: "The administration of any statute, likely to produce additional taxation to be imposed upon a vast number of taxpayers, the extent of whose several liability is indefinite and constantly changing, is essentially a matter of public and not of individual concern. If one taxpayer may champion and litigate such a cause, then every other taxpayer may do the same...." *Id.* at 487, 43 S.Ct. 597; *see also Doremus v. Bd. of Educ. of Hawthorne,* 342 U.S. 429, 433-34 (1952).

In 1968, 45 years after *Frothingham,* the Supreme Court carved out a narrow exception to the general constitutional bar on taxpayer suits; the Court held that federal taxpayers had standing to bring an Establishment Clause challenge to federal financing for parochial schools. *See Flast,* 392 U.S. 83. But according to *Flast,* taxpayers may bring an Establishment Clause challenge only when they challenge legislation passed pursuant to the Taxing and Spending Clause in Article I, § 8 of the Constitution. *See id.* at 102-03.

The Court has subsequently made clear that *Flast* is a very narrow exception to the general bar against taxpayer standing. In *Valley Forge,* for example, the plaintiffs argued that the Government violated the Establishment Clause when it transferred a tract of "surplus property" to a Christian college. *Valley Forge Christian Coll. v. Americans United for Separation of Church & State,* 454 U.S. 464, 467-68 (1982) (internal quotation marks omitted). The Court found that the plaintiffs, a group composed of "90,000 taxpayer members," did not have standing both because the challenged action was executive rather than legislative and because the property transfer was an exercise of executive authority pursuant to legislation passed under the Property Clause in Article IV, § 3 of the Constitution rather than the Taxing and Spending Clause in Article I, § 8. *Id.* at 469, 479-80 (internal quotation marks omitted).

In *Bowen v. Kendrick,* the Supreme Court allowed a group of federal taxpayers to challenge the Adolescent Family Life Act, a statute appropriating funds for religious organizations, among others, to fight teen pregnancy. 487 U.S. 589, 593, 596-97 (1988). The Court found that plaintiffs' claim challenged a program expressly authorized by Congress under the taxing and spending power, thus fitting within *Flast. Id.* at 619. The key to *Bowen*'s conclusion, as the Court has subsequently explained, was that the statute was " 'at heart a program of disbursement of funds pursuant to Congress' taxing and spending powers' " and that plaintiffs' claims were concerned with the expenditure of funds " 'pursuant to the AFLA's statutory mandate.' " *Hein,* 127 S.Ct. at 2567 (quoting *Bowen,* 487 U.S. at 619-20) (emphasis omitted).

In its recent decision in *Hein,* the Court declined to expand *Flast* to encompass discretionary Executive Branch spending: "Because almost all Executive Branch activity is ultimately funded by some congressional appropriation, extending the *Flast* exception to purely executive expenditures would effectively subject every federal action-be it a conference, proclamation or speech-to Establishment Clause challenge by any taxpayer in federal court." *Id.* at 2569. Although *Hein* did not eliminate the *Flast* exception to the bar against taxpayer standing, the case forcefully emphasized the exception's extremely limited contours: "It is significant that, in the four decades since its creation, the *Flast* exception has largely been confined to its facts." *Id.* at

2568-69. As *Hein* explained, the Court has limited the "expansion of federal taxpayer and citizen standing in the absence of specific statutory authorization to an outer boundary drawn by the results in *Flast.*" *Id.* at 2569 (internal quotation marks and emphasis omitted).[3]

In this case, plaintiffs' claim does not fit within the narrow *Flast* exception. No legislative enactment expressly authorizes or appropriates funds for the Navy to favor Catholic chaplains in its retirement system. Plaintiffs cite, for example, the statutes establishing the Navy Chaplain Corps, but those statutes make no reference to denominational category, only to chaplains generally. *See* 10 U.S.C. §§ 5142, 5150. And plaintiffs, who themselves are chaplains, obviously do not contend that congressional legislation establishing the Navy Chaplaincy itself violates the Establishment Clause; they merely want the Navy to operate the Chaplain Corps differently. *Cf. Katcoff v. Marsh,* 755 F.2d 223

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[3] The *Flast* exception may be further limited to Congress's disbursement of federal funds *outside the Government.* In both *Flast* and *Bowen v. Kendrick,* the only two Supreme Court cases upholding taxpayer standing, the statutes authorized disbursement of federal funds to outside entities, including religious organizations. But we need not address that question in this case given that plaintiffs' argument for taxpayer standing fails at a more basic level.

(2d Cir.1985) (approving military chaplaincy program).

As in *Hein,* the challenged expenditures here-extra salary and retirement-related benefits allegedly provided to Catholic chaplains-"were not expressly authorized or mandated by any specific congressional enactment." *Hein,* 127 S.Ct. at 2568. Indeed, plaintiffs contend that the Chaplain Corps is being operated by the Navy in contravention of the law, not in accordance with the law. *See* Plaintiffs' Br. 48 ("Appellees have not followed either the law or the DOD regulations."). Under the Supreme Court's precedents, that contention directly undermines any claim to taxpayer standing. In sum, plaintiffs do not have standing as taxpayers.

B

Plaintiffs alternatively contend that they have standing because "Establishment Clause injury flows from the forbidden messages of preference or disapproval" inherent in the Navy's denominational preference. Plaintiffs' Br. 28. In so arguing, they rely primarily on this Court's decision in *Chaplaincy,* which explained that for the purposes of a preliminary injunction, the "mere allegation" of an Establishment Clause violation is always sufficient to show irreparable harm. *Chaplaincy of Full Gospel Churches v. England,* 454 F.3d 290, 303-04 (D.C.Cir.2006). Plaintiffs claim that because their allegations demonstrate irreparable injury for preliminary injunction purposes, they have

necessarily shown injury-in-fact for standing purposes.

But the Court in *Chaplaincy* merely held that the allegation of an Establishment Clause violation is sufficient to satisfy the irreparable harm prong of the preliminary injunction standard-*presupposing that a party has standing to allege such a violation. See id.* at 303-04 & n. 8. A per se rule defining automatic injury-in-fact for every plaintiff who claims an Establishment Clause violation-as plaintiffs strain to find in the *Chaplaincy* opinion-would run counter to decades of settled jurisprudence setting forth the requirements for standing in Establishment Clause cases. Jurisdictional requirements are not disposed of so easily, and the Court in *Chaplaincy* did not purport to make the sweeping change attributed to it by plaintiffs.

Apart from citing *Chaplaincy,* plaintiffs also claim injury-in-fact from their being subjected to the "message" of religious preference conveyed by the Navy's allegedly preferential retirement program for Catholic chaplains. The program, they say, makes them feel like second-class citizens within the Navy Chaplaincy even if they themselves have not suffered discrimination on account of their religion.

As the Supreme Court has often stated, mere personal offense to government action does not give rise to standing to sue. *Allen v. Wright,* 468 U.S. 737, 752-54, (1984); *see also Lujan v. Defenders of Wildlife,* 504 U.S. 555, 575-76 (1992). "By the mere bringing of

his suit, *every* plaintiff demonstrates his belief that a favorable judgment will make him happier. But although a suitor may derive great comfort and joy" from knowing that the Government is following constitutional imperatives, "that psychic satisfaction is not an acceptable Article III remedy because it does not redress a cognizable Article III injury." *Steel Co. v. Citizens for a Better Env't,* 523 U.S. 83, 107 (1998). "Recognition of standing in such circumstances would transform the federal courts into no more than a vehicle for the vindication of the value interests of concerned bystanders." *Allen,* 468 U.S. at 756 (internal quotation marks omitted).

Plaintiffs respond that their claim is similar to religious display and prayer cases where courts have found (or at least apparently assumed) standing. *See, e.g., McCreary County v. ACLU,* 545 U.S. 844, 851-52 (2005) (Ten Commandments displays that were "readily visible" to citizens conducting civic business) (internal quotation marks omitted); *Van Orden v. Perry,* 545 U.S. 677, 681-82 (2005) (Ten Commandments display on the grounds of the Texas State Capitol that petitioner frequently encountered); *County of Allegheny v. ACLU,* 492 U.S. 573, 578 (1989) (crèche display in county courthouse and menorah display outside city-county building); *Suhre v. Haywood County,* 131 F.3d 1083, 1086 (4th Cir.1997) (Ten Commandments display in county courtroom; noting that display cases are "particularized subclass of Establishment Clause standing jurisprudence"); *see also Lee v. Weisman,* 505

U.S. 577, 580 (1992) (governmental prayer at school graduation); *Marsh v. Chambers*, 463 U.S. 783, 784-85 (1983) (daily prayer at opening of state legislature); *Sch. Dist. of Abington Township v. Schempp*, 374 U.S. 203, 205-12 (1963) (daily Bible reading in class); *Engel v. Vitale*, 370 U.S. 421, 422-23 (1962) (official state prayer in class).

These Supreme Court cases do not all directly discuss the standing issue. It is a well-established rule that "cases in which jurisdiction is assumed *sub silentio* are not binding authority for the proposition that jurisdiction exists." *John Doe, Inc. v. DEA*, 484 F.3d 561, 569 n. 5 (D.C.Cir.2007) (internal quotation marks omitted). In any event, accepting those cases as precedents on standing,[4] we nonetheless find significant differences between plaintiffs' case and the religious display and prayer cases. In the religious display and prayer cases, the Government was actively and directly communicating a religious message through religious words or religious symbols-in other words, it was engaging in religious speech that was observed, read, or heard by the plaintiffs in those cases.

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[4] See generally *Doe v. Tangipahoa Parish Sch. Bd.*, 494 F.3d 494, 499-502 (5th Cir.2007) (DeMoss, J., concurring); Ira C. Lupu & Robert W. Tuttle, *Ball on a Needle: Hein v. Freedom from Religion Foundation, Inc. and the Future of Establishment Clause Adjudication*, 2008 B.Y.U. L.REV. 115, 158-64 (2008).

Here, by contrast, the Navy is not communicating a religious message through religious words or religious symbols. Plaintiffs' objection here is more akin to the objection to the property transfer in *Valley Forge,* where the Court stated that the plaintiffs failed "to identify any personal injury suffered by them as a consequence of the alleged constitutional error, other than the psychological consequence presumably produced by *observation of conduct* with which one disagrees. That is not an injury sufficient to confer standing under Art. III, even though the disagreement is phrased in constitutional terms." *Valley Forge,* 454 U.S. at 485-86 (emphasis added and omitted); *see also Suhre,* 131 F.3d at 1086 (quoting *Valley Forge* and stating "a mere abstract objection to unconstitutional conduct is not sufficient to confer standing").

Plaintiffs' argument would extend the religious display and prayer cases in a significant and unprecedented manner and eviscerate well-settled standing limitations. Under plaintiffs' theory, every government *action* that allegedly violates the Establishment Clause could be re-characterized as a governmental *message* promoting religion. And therefore everyone who becomes aware of the "message" would have standing to sue. The neighbors in *Valley Forge,* the hotel workers at a conference for faith-based organizations in *Hein,* the list goes on-all could have obtained standing to sue simply by targeting not the government's action, but rather the government's alleged "message" of religious preference communicated

through that action. Indeed, as plaintiffs' counsel acknowledged at oral argument, under plaintiffs' standing theory any recipient of the Navy's "message" in this case, including the judges on this panel, would have standing to bring suit challenging the allegedly discriminatory Chaplain Corps. Oral Arg. Tr. at 6-7. The jurisdictional requirements of Article III are not so manipulable. They do not allow anyone who becomes aware of a government action that allegedly violates the Establishment Clause to sue over it on the ground that they are offended by the allegedly unconstitutional "message" communicated by that action. In the government employment context at issue here, it thus comes as no surprise that neither plaintiffs nor the dissent has cited any case holding that a plaintiff can maintain a religious employment discrimination suit under the Religion Clauses when complaining about employment discrimination suffered by others, not by the plaintiff himself or herself. We think the reason for the dearth of precedent is evident: When plaintiffs are not themselves affected by a government *action* except through their abstract offense at the *message* allegedly conveyed by that action, they have not shown injury-in-fact to bring an Establishment Clause claim, at least outside the distinct context of the religious display and prayer cases.

To be sure, we recognize that plaintiffs' creative analogy to the religious display and prayer cases has some surface logic. But the implications of plaintiffs' theory for standing doctrine are quite radical: Plaintiffs

seek to use the religious display and prayer cases to wedge open the courthouse doors to a wide range of plaintiffs alleging Establishment Clause violations who were previously barred by bedrock standing requirements-requirements that are essential to preserving the separation of powers and limited judicial role mandated by the Constitution. We decline the invitation to transform Establishment Clause standing doctrine in this way. What the Supreme Court said last year in *Hein* applies just as well to plaintiffs' reliance on the religious display and prayer cases here: "It is a necessary concomitant of the doctrine of *stare decisis* that a precedent is not always expanded to the limit of its logic." *Hein,* 127 S.Ct. at 2571.

* * *

We affirm the judgment of the District Court.

So ordered.

ROGERS, *Circuit Judge*, dissenting: The Establishment Clause prevents "the Government's placing its official stamp of approval upon one particular kind of prayer or one particular form of religious services," *Engel v. Vitale,* 370 U.S. 421, 429 (1962), and ensures that "all creeds ... be tolerated and none favored," *Lee v. Weisman,* 505 U.S. 577, 590 (1992); *see McCreary County v. Am. Civ. Liberties Union of Ky.*, 545 U.S. 844, 860 (2005). A governmental

accommodation for religion may violate the Establishment Clause if it "singles out a particular religious sect for special treatment" because "whatever the limits of permissible ... accommodations may be ..., it is clear that neutrality as among religions must be honored." *Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet,* 512 U.S. 687, 706-07, 114 S.Ct. 2481, 129 L.Ed.2d 546 (1994) (citations omitted). " 'When the power, prestige and financial support of government [are] placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain.' " *Sch. Dist. of Abington Twp. v. Schempp,* 374 U.S. 203, 221 (1963) (quoting *Engel,* 370 U.S. at 430-31).

In *Chaplaincy of Full Gospel Churches v. England,* 454 F.3d 290 (D.C.Cir.2006), the court thus observed that the liberty interest shielded by the Establishment Clause is "protection against government imposition of a state religion *or religious preference," id.* at 302 (emphasis added). Stating that "the Establishment Clause is implicated as soon as the government engages in impermissible action," *id.*, the court explained that unlike freedom of expression cases, for example, "[t]he harm inflicted by religious establishment is self-executing and requires no attendant conduct on the part of the individual," *id.* at 303; *see also id.* at 302. In describing the impermissible government action at issue, the court stated:

> Where, as here, the charge is one of official preference of one religion over another, such governmental endorsement "sends a message to nonadherents [of the favored denomination] that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community."

Id. at 302 (quoting *Lynch v. Donnelly,* 465 U.S. 668, 688, (1984) (O'Connor, J., concurring)) (alteration in original). The court held that such an allegation sufficed to show irreparable harm, or "injury [that is] beyond remediation [by monetary damages]," *id.* at 297, for the purpose of obtaining injunctive relief, crediting appellants' allegation of "the harm that flows from the 'forbidden message' of marginalization [that the Navy's] actions send to [them]," *id.* at 299 (quoting Appellants' Br. at 20). The court did not expressly hold that appellants[1] had Article III standing, but *see Steel Co.*

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[1] Due to the consolidation of three cases, appellants include active duty, reserve, retired, and former non-liturgical Protestant Navy chaplains as in *Chaplaincy,* and two endorsing agencies-Chaplaincy of Full Gospel Churches and Associated Gospel Churches. Hereinafter in referring to "appellants," I refer only to the chaplains currently serving in the Navy Chaplain Corps.

v. Citizens for a Better Env't, 523 U.S. 83, 94-95 (1998), but noted that its legal "conclusion presupposes, of course, that the party has standing to allege such a violation," *Chaplaincy,* 454 F.3d at 304 n. 8.

The court's decision in *Chaplaincy* regarding appellants' liberty interest that is protected by the Establishment Clause and the nature of their injury is no less applicable here. The same parties and the same charge are involved, *see LaShawn A. v. Barry,* 87 F.3d 1389, 1393-95 (D.C.Cir.1996) (en banc), and injury sufficient for irreparable harm has resonance for injury-in-fact under Article III, *see Taylor v. Resolution Trust Corp.,* 56 F.3d 1497, 1508 (D.C.Cir.1995), because to show irreparable harm "[a] plaintiff must do more than merely allege ... harm sufficient to establish standing," *Associated Gen. Contractors of Cal., Inc. v. Coal. for Econ. Equity,* 950 F.2d 1401, 1410 (9th Cir.1991). As explained in *Chaplaincy,* "[t]his court has set a high standard for irreparable injury" within the preliminary injunction inquiry. 454 F.3d at 297. Such injury must be "both certain and great," "actual and not theoretical," "beyond remediation," and also "of such imminence that there is a clear and present need for equitable relief to prevent irreparable harm." *Id.* (quotation marks and citations omitted). For Article III, the requisite injury-in-fact must be "concrete and particularized" and "actual or imminent," not "hypothetical." *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992) (quotation marks omitted). Because "the Navy's alleged

violation of the Establishment Clause per se constitutes irreparable harm," *Chaplaincy,* 454 F.3d at 299, appellants have met their burden on the injury prong of Article III standing.[2]

As members of non-liturgical Protestant churches and fellowships, appellants assert that the Navy has singled out the Catholic faith as the preferred religious tradition in its Chaplain Corps by choosing over several decades to allow only Catholic chaplains to serve beyond the required separation dates.[3] This sends a message of

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[2] To the extent the court seeks to avoid this precedent by interpreting a footnote in *Chaplaincy* to indicate that the court was "presupposing" appellants' standing, Op. at 762-63, and thus addressing the request for injunctive relief without satisfying itself that appellants had standing, its approach is contrary both to the principle in *Steel Co.,* 523 U.S. at 94-95, and to the more natural reading of the footnote as merely recognizing, as this court has done before, that this prong of the preliminary injunction inquiry and the entirety of the Article III standing inquiry "overlap[ ] ... somewhat," but are not coextensive, *see Taylor,* 56 F.3d at 1508.

[3] According to appellants, "the 4109 program" has three parts: (1) illegal appointments to active duty through age waivers for over-age Catholic

denominational preference for Catholics and marginalization for non-Catholic adherents, causing appellants to suffer psychological harm while serving as chaplains. Compl. ¶¶ 3, 37(e), 39. By endowing Naval officer status in a preferential manner upon the representatives of a particular type of religious

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clergy, (2) the consequent illegal continuation of such clergy as chaplains to the age of 67, and (3) the eventual illegal transfer of such clergy to the Retired Reserve and subsequent recall to active duty as designated 4109 Reservists. The program is designed in part to allow Catholic chaplains who have reached their statutory separation age to continue to serve until they have completed twenty years of service and become eligible for pensions. *See* 10 U.S.C. §§ 1251, 14509, 14703; *see also Chaplaincy*, 454 F.3d at 293-96. At the time appellants filed their complaints, the age limit for the appointment of chaplains, like other officers, was forty-two, *see* 10 U.S.C. § 532(a)(2); while this provision is no longer applicable to chaplains, *id.* at § 532(d)(1) (as amended by Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005, Pub.L. No. 108-375, 188 Stat. 1811, 1872 (Oct. 28, 2004)), the statutory separation age for chaplains and other officers remains in effect.

ministry,[4] who then, as part of their Naval service duties, use words and symbols to serve their religious cause, the Navy allegedly has "take[n] sides in a religious matter, effectively discriminating in favor of [one religion's] view," *Commack Self-Serv. Kosher Meats, Inc. v. Weiss,* 294 F.3d 415, 425 (2d Cir.2002), of the type of religious ministry that is most appropriate to serve "the religious needs of sailors," *In re England,* 375 F.3d 1169, 1171 (D.C.Cir.2004). *See, e.g., McCreary County,* 545 U.S. at 860; *Kiryas Joel Vill.*, 512 U.S. at 698-705.

Appellants have suffered particularized Article III injury because they are not strangers to the Navy's 4109 program. Their membership within the Chaplain Corps and their resulting receipt of a message of denominational preference make them comparable to a

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[4] Appellants cite a list of Catholic chaplains coded as "4109" currently serving with them in the Navy Chaplain Corps, and assert that additional chaplains are destined to become 4109 chaplains in view of the Navy's list of Catholics appointed after age forty-two and extended on active duty and the dates they become eligible for pensions. For example, non-liturgical Protestant Chaplain Stewart served with over-age Catholic Chaplain Erestain. After this court's decision in *Chaplaincy*, it appears that the Navy extended two non-Catholic chaplains for service beyond the age of 62. See 454 F.3d at 295.

citizen who has "personal contact with the alleged establishment of religion," *Suhre v. Haywood County,* 131 F.3d 1083, 1086 (4th Cir.1997), such as in the religious display cases.[5] Appellants' charge does more than present a "creative analogy" with "some surface logic," Op. at 765, as the court offers no basis for its unsupported conclusion that this case is different from "the distinct context of the religious display and prayer cases," *id.* As counsel for the Navy acknowledged, "if a chaplain ... is personally exposed to a [message of religious preference], there would be traditional standing." Oral Arg. Tr. at 13 (Apr. 24, 2008). That is what appellants allege in charging that

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[5] *See, e.g.*, *Vasquez v. L.A. County,* 487 F.3d 1246, 1250-51 (9th Cir.2007); *Doe v. Tangipahoa Parish Sch. Bd.,* 473 F.3d 188, 196 (5th Cir.2006); *ACLU Neb. Found. v. City of Plattsmouth,* 358 F.3d 1020, 1026-31 (8th Cir.2004), *adopted in relevant part,* 419 F.3d 772, 774 n. 4 (8th Cir.2005) (en banc); *Altman v. Bedford Cent. Sch. Dist.,* 245 F.3d 49, 72 (2d Cir.2001); *Washegesic v. Bloomingdale Pub. Schs.,* 33 F.3d 679, 682-83 (6th Cir.1994); *Doe v. County of Montgomery,* 41 F.3d 1156, 1159-60 (7th Cir.1994); *Foremaster v. City of St. George,* 882 F.2d 1485, 1490-91 (10th Cir.1989); *Saladin v. City of Milledgeville,* 812 F.2d 687, 691-93 (11th Cir.1987); *Allen v. Hickel,* 424 F.2d 944, 947 (D.C.Cir.1970).

the 4109 program establishes an "official preference of one religion over another" that causes them psychological injury due to their personal and direct receipt of the " 'message ... that they are outsiders, not full members' " of the Navy's Chaplain Corps. *Chaplaincy,* 454 F.3d at 302 (quoting *Lynch,* 465 U.S. at 688, 104 S.Ct. 1355 (O'Connor, J., concurring)). Appellants' injury is thus as particularized, *see Lujan,* 504 U.S. at 561 n. 1, 573-74,; *Warth v. Seldin,* 422 U.S. 490, 502 (1975), as that of the children in *Schempp,* 374 U.S. at 223-24, to whom school prayers were read, the plaintiffs in *Women's Equity Action League (WEAL) v. Cavazos,* 879 F.2d 880, 884-85 (D.C.Cir.1989), who were enrolled or employed in segregated schools, and the state legislator in *Marsh v. Chambers,* 463 U.S. 783, 786 n. 4 (1983), who objected "as a member of the Legislature" to the use of a state-employed chaplain to convene its sessions. As members of a statutorily-defined community within the armed forces, appellants are not mere bystanders, *Allen v. Wright,* 468 U.S. 737, 756 (1984), and they did not "roam the country," *Valley Forge Christian Coll. v. Ams. United for Separation of Church and State,* 454 U.S. 464, 487 (1982), in search of impermissible government action.[6]

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[6] Contrary to the court's suggestion, Op. at 764, *Valley Forge* included no indication that the Supreme Court questioned the plaintiffs' standing on the ground that a government land transfer to a religious institution could not send a message of government endorsement of

The uniqueness of appellants' injury as chaplains in relation to their service in the Navy Chaplain Corps eliminates the concern expressed in *Valley Forge* that recognizing their standing would, in this court's words, inappropriately "wedge open the courthouse doors," Op. at 765; *see also id.* at 762, 764. Appellants' charge is based on an injury distinct to their status within the Chaplain Corps, *see Schempp,* 374 U.S. at 224 n. 9; *Chaplaincy,* 454 F.3d at 302; *see also WEAL,* 879 F.2d at 884-85, and, "like *Schempp* before it, *Valley Forge* recognized that direct contact with an unwelcome religious exercise or display works a personal injury

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religion and thus violate the Establishment Clause. The Court based its Article III holding on the fact that the plaintiffs did not live in the state where the land transfer had occurred, had learned about it indirectly through a press release, and indicated no connection with the transfer that could personalize their stake in the suit. *See* 454 U.S. at 486-87, 102 S.Ct. 752; *see also ASARCO Inc. v. Kadish,* 490 U.S. 605, 616 (1989). As our sister circuits have held, *Valley Forge*' s holding, 454 U.S. at 485-87, 102 S.Ct. 752, suggests that "[t]he neighbors in *Valley Forge,*" Op. at 764, may be the very plaintiffs who would have had standing there. *See, e.g., Suhre,* 131 F.3d at 1087; *Washegesic,* 33 F.3d at 682-83; *ACLU of Ga. v. Rabun County Chamber of Commerce, Inc.,* 698 F.2d 1098, 1106-07 (11th Cir.1983).

distinct from and in addition to each citizen's general grievance against unconstitutional government conduct," *Suhre,* 131 F.3d at 1086. Their alleged "genuine feeling of exclusion from the community ..., and the deep offense from a perceived insult to one's religious view committed by the government in one's community," *Ariz. Civ. Liberties Union v. Dunham,* 112 F.Supp.2d 927, 935 (D.Ariz.2000); *see Suhre,* 131 F.3d at 1087; *Saladin,* 812 F.2d at 692-93, demonstrates that appellants have suffered a personal injury-in-fact.

To reach the opposite conclusion, the court ignores both the nature of appellants' charge and binding precedent. First, the court describes the charge as if it concerns only religious discrimination in traditional monetary terms, such as retirement benefits not denied to appellants or "discrimination suffered by others." *See* Op. at 758-59, 759, 760-61, 764. Yet appellants do not so delimit their charge; rather, they allege that the Navy's 4109 program violates the Establishment Clause by creating a government religious preference, *see Chaplaincy,* 454 F.3d at 302.[7]

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[7] Although the court suggests that appellants have waived aspects of their allegations, Op. at 763, 764, the record is clear that they have not abandoned their Establishment Clause charge of an unconstitutional endorsement of a religious denomination that is particularized to them personally. Oral Arg. Tr. at 8-10; 25. Counsel emphasized that it is appellants' "direct contact

Appellants' standing thus does not hinge upon the mistreatment of any individual chaplain but upon the Navy's alleged endorsement of a preference for another religious faith that directly affects them. The court's narrow focus ignores the Constitution's requirement that, in assessing constitutional injury, "we keep in mind 'the myriad, subtle ways in which Establishment Clause values can be eroded,' " and that in addition to the mistreatment of an individual, "we [must] guard against other different, yet equally important, constitutional injuries," such as the unconstitutional implementation of a government policy. *Santa Fe Indep. Sch. Dist. v. Doe,* 530 U.S. 290, 314 (2000) (quoting *Lynch,* 465 U.S. at 694 (O'Connor, J., concurring)).

Second, the court states that "mere personal offense" or emotional injury is never enough for Article III injury, Op. at 763, but that is not the law.[8] As the

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[with the 4109 program and its message] because of the small community" that creates their injury, *id.* at 761-62, for due to their direct exposure as chaplains, they experience the 4109 program as a ~~ty~~pe of faith discrimination, "a religious gerrymander," because "[i]t draws lines" to favor one religious faith over another. *Id.* at 762-63; *see also* Appellants' Br. at 27.

[8] *See, e.g., Am. Soc.'y for Prevention of Cruelty to Animals v. Ringling Bros. & Barnum & Bailey*

Supreme Court acknowledged in *Association of Data Processing Service Organizations, Inc. v. Camp,* 397 U.S. 150 (1970), "[a] person ... may have a spiritual stake in First Amendment values sufficient to give standing to raise issues concerning the Establishment Clause" if directly affected by the challenged governmental practice, *id.* at 154 (citing *Schempp,* 374 U.S. 203); *see Valley Forge,* 454 U.S. at 486-87 & n. 22. Later, in *Allen,* 468 U.S. at 755, while holding that a plaintiff alleging an equal protection violation generally must claim a personal denial of equal treatment, the Supreme Court observed that "[t]here can be no doubt that ... noneconomic injury [such as stigmatizing injury] is one of the most serious consequences of discriminatory government action and is sufficient in some circumstances to support standing."[9] In fact, the

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Circus, 317 F.3d 334, 337-38 (D.C.Cir.2003).

[9] *See, e.g., WEAL,* 879 F.2d at 884-85; *Gray v. Greyhound Lines, E.,* 545 F.2d 169, 175 (D.C.Cir.1976); *see also Shaw v. Hunt,* 517 U.S. 899, 904 (1996) (citing *United States v. Hays,* 515 U.S. 737 (1995); *Shaw v. Reno,* 509 U.S. 630 (1993)); *Trafficante v. Metro. Life Ins. Co.,* 409 U.S. 205, 211 (1972); Richard H. Pildes & Richard G. Niemi, *Expressive Harms, "Bizarre Districts," and Voting Rights: Evaluating Election-District Appearances After Shaw v. Reno,* 92 MICH. L.REV. 483, 511-15 (1993); *cf.*

Supreme Court has reached the merits in numerous Establishment Clause cases where "mere personal offense," Op. at 761-62, resulting from a plaintiff's connection to a challenged practice appears to have provided the main possible injury to ground standing.[10] As the Fourth Circuit has observed:

> [T]he Establishment Clause plaintiff is not likely to suffer physical injury or pecuniary loss. Rather the spiritual, value-laden beliefs of the plaintiffs are often most directly affected by an alleged establishment of religion. Accordingly, rules of standing recognize that noneconomic or intangible injury may suffice to make an Establishment Clause claim justiciable.

Suhre, 131 F.3d at 1086 (quotation marks and citations

Brown v. Bd. of Educ., 347 U.S. 483, 494 (1954).

[10] *See, e.g.*, *Van Orden v. Perry*, 545 U.S. 677, 682, (2005); *McCreary County*, 545 U.S. at 853; *Lee*, 505 U.S. at 581; *County of Allegheny v. ACLU Greater Pittsburgh Chapter*, 492 U.S. 573, 587 (1989); *Edwards v. Aguillard*, 482 U.S. 578, 581 (1987); *Wallace v. Jaffree*, 472 U.S. 38, 42 (1985); *Lynch*, 465 U.S. at 671; *see also* Op. at 763-64 & n. 4.

omitted); *see supra* note 5.

Equally problematic is the court's attempt to contrast appellants' case with those where the government has, in the court's words, "actively and directly communicat[ed] a religious message through religious words or religious symbols," Op. at 764. Establishment Clause precedent is not so conveniently cabined into the narrow circumstances described by the court, where the government itself "engag[ed] in religious speech," *id.* For one thing, the government need not intentionally favor one religious denomination over another in order to violate the Establishment Clause if its action has such an effect.[11] When considering whether a government action has the effect of conveying a denominational endorsement, "[t]he question of governmental neutrality is not concluded by the observation that [a policy] on its face makes no discrimination between religions." *Gillette v. United*

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[11] Agostini v. Felton, 521 U.S. 203, 223 (1997); *County of Allegheny,* 492 U.S. at 592-93; *Larkin v. Grendel's Den, Inc.,* 459 U.S. 116, 125-26 (1982); *Lemon v. Kurtzman,* 403 U.S. 602, 612-13 (1971); *Mt. Royal Joint Venture v. Kempthorne,* 477 F.3d 745, 758 (D.C.Cir.2007); *United Christian Scientists v. Christian Sci. Bd. of Dirs., First Church of Christ, Scientist,* 829 F.2d 1152, 1161-62 (D.C.Cir.1987); *Allen v. Morton,* 495 F.2d 65, 69-70 (D.C.Cir.1973) (Tamm, J., joined by Robb, J., concurring).

States, 401 U.S. 437, 452 (1971). Equally important, there also is no requirement that the government go so far as to use "religious words or religious symbols," Op. at 764, to establish an unconstitutional religious endorsement. Rather, "the Establishment Clause forbids subtle departures from neutrality, 'religious gerrymanders,' as well as obvious abuses." *Gillette,* 401 U.S. at 452 (quoting *Walz v. Tax Comm'n,* 397 U.S. 664, 696 (1970) (Harlan, J., concurring)). And, "the most basic command of the Establishment Clause-not to prefer some religions (and thereby some approaches to indoctrinating religion) to others"-does not apply only to a government action such as a prayer or ceremony that explicitly adopts a denomination's chosen religious symbols, but also to other action taken in the usual course of government regulation or operation. *Univ. of Great Falls v. NLRB,* 278 F.3d 1335, 1346 (D.C.Cir.2002) (citing *Larson v. Valente,* 456 U.S. 228, 244 (1982)); *see, e.g., Mt. Royal Joint Venture,* 477 F.3d at 748; *Littlefield v. Forney Indep. Sch. Dist.,* 268 F.3d 275, 294 (5th Cir.2001). Thus, government action that draws a line around a religious denomination in a community can send a symbolic message of preference that needs no words just as easily as the government's direct presentation of a religious symbol. *See, e.g., Kiryas Joel Vill.,* 512 U.S. at 697 (citing *Larkin,* 459 U.S. at 125-26).

The court ignores all of this precedent in adopting the novel conception that appellants are not harmed for purposes of standing under the Establishment Clause

unless the Navy itself directly uses religious words or symbols as occurred in the religious display cases, Op. at 763, 764-65. Rather than distinguish precedent in a reasoned manner, the court's holding is the assertion that "[w]hen plaintiffs are not themselves affected by a government *action* except through their abstract offense at the message allegedly conveyed by that action, they have not shown injury-in-fact to bring an Establishment Clause claim, at least outside the distinct context of the religious display and prayer cases." *Id.* at 764-65 (emphasis in original). Yet, "[t]he Establishment Clause, at the very least, prohibits government from *appearing* to take a position on questions of religious belief or from 'making adherence to a religion relevant in any way to a person's standing in the ... community,' " *County of Allegheny,* 492 U.S. at 594 (quoting *Lynch,* 465 U.S. at 687 (O'Connor, J., concurring)) (emphasis added), and so directs the government to avoid a practice that "*may appear* to the nonbeliever or dissenter to be an attempt to employ the machinery of the [government] to enforce a religious orthodoxy," *Lee,* 505 U.S. at 592 (emphasis added). Moreover, when a court reaches the merits "[i]n cases involving [government] participation in a religious activity"-such as the employment of Navy chaplains as religious ministry professionals-the question is "whether an objective observer ... would perceive [its action] as a [governmental] endorsement" of religion. *Santa Fe Indep. Sch. Dist.,* 530 U.S. at 308 (quotation marks omitted). Even so secular an act as the grant of a copyright, this court held, ran aground because

providing exceptional copyright benefits to a particular religious institution "bestowed upon the Church ... symbolic recognition as guardian of the [contested] text," with consequent practical advantages, and "ha[d] the unmistakable effect of advancing the Church's cause." *United Christian Scientists,* 829 F.2d at 1171. Although the religious institution alone used religious words and symbols, the government's unusual treatment of one church "unequivocally and unqualifiedly endorsed [it] as first interpreter and guardian of th[e] [copyrighted] work." *Id.* at 1170; *see also Commack,* 294 F.3d at 425.

Here, within the context of their chaplaincy assignments and in the absence of a legitimate explanation, the 4109 program could fairly be understood as a religious endorsement because it has the effect of selecting particular "religious words and symbols," Op. at 764, to play an enhanced role within the Navy Chaplain Corps by specially retaining only representatives of the Catholic faith for extended service in which they engage in religious speech on behalf of that Corps. *See Santa Fe Indep. Sch. Dist.,* 530 U.S. at 307-09 The job of a 4109 chaplain, as for all chaplains, requires representing a particular denomination as a "religious ministry professional," an "individual endorsed to represent a religious organization and to conduct its religious observances or ceremonies." Instruction 1304.28, Guidance for the Appointment of Chaplains for the Military Departments ¶¶ 6, E.2.1.9 (Dep't of Def. June 11, 2004); *see England,*

375 F.3d at 1171.[12] So understood, due to appellants' direct exposure to the 4109 program's preference for Catholics, the Navy conveys to them the "message ... that [as nonadherents of the favored denomination] they are outsiders, not full members of the ... community," *McCreary County,* 545 U.S. at 860 (quotation marks omitted), for "the government[ ] [appears to be] lending its support to the communication of a religious organization's religious message," *County of Allegheny,* 492 U.S. at 601; *see Larkin,* 459 U.S. at 125-26; *Commack,* 294 F.3d at 425; *United Christian Scientists,* 829 F.2d at 1170-71, and thus causes them psychological harm as Navy chaplains that is cognizable under the Establishment Clause.

In any event, whether the Navy's 4109 program sends a prohibited message is a merits question that is not before the court, *see Info. Handling Servs., Inc. v. Def. Automated Printing Servs.,* 338 F.3d 1024, 1029 (D.C.Cir.2003). Of course, the court's premature determination of this issue may arise from the realization that if a personally observed religious message causes harm "there would be traditional standing," as the Navy's counsel acknowledged, Oral

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[12] See also Instruction 1730.7B, Religious Ministry Support within the Department of the Navy ¶ 4.a (Dep't of Navy, Ofc. of Sec'y Oct. 12, 2000); Instruction 1730.1D, Religious Ministry in the Navy ¶ 4 (Dep't of Navy, Ofc. of Ch. of Naval Operations May 6, 2003).

Arg. Tr. at 13; *see also id.* at 18-22. At this point in the proceedings in determining Article III standing, however, the court must assume the merits of appellants' charge that the Navy's 4109 program "d[oes], in fact, convey" a message of denominational preference directly harming them as chaplains. *Vasquez,* 487 F.3d at 1251; *see Warth,* 422 U.S. at 500, 502; *Info. Handling Servs.,* 338 F.3d at 1029; *City of Waukesha v. EPA,* 320 F.3d 228, 235 (D.C.Cir.2003).

Under the Establishment Clause, then, appellants' membership in a narrowly defined community-the Navy Chaplain Corps-directly affected by the 4109 program, and the message this program communicates to them as chaplains particularizes their injury-in-fact, for "[t]he practices of [one's] own community may create a larger psychological wound than someplace [one is] just passing through," *Washegesic,* 33 F.3d at 683, by making one feel like a "second class citizen[ ]," *Saladin,* 812 F.2d at 693; *see Suhre,* 131 F.3d at 1090. This directly follows from *Chaplaincy* and Supreme Court precedent, both of which the court misconstrues. Because appellants' injury-in-fact is traceable to the Navy's 4109 program and is likely to be redressed by holding that the program is unlawful and enjoining preferential treatment of 4109 chaplains and the message it sends to appellants, they also meet the other prongs of the standing test, *see Lujan,* 504 U.S. at 560-61

Accordingly, I would reverse the denial of the

motion for a preliminary injunction and leave for the district court to determine upon remand whether appellants have otherwise met the requirements for obtaining a preliminary injunction, *see Chaplaincy,* 454 F.3d at 305, and respectfully dissent. Because appellants have Article III standing, I do not reach the question whether they also have taxpayer standing.

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 07-5359 **September Term 2008**

07ms00269

Filed On: November 17, 2008

In re: Navy Chaplaincy,

Chaplaincy of Full Gospel Churches, at al.,
Appellants

v.

United States Navy, et al.,
Appellees

BEFORE: Sentelle, Chief Judge, and Ginsburg, Henderson, Rogers*, Tatel, Garland, Brown*, Griffith, and Kavanaugh, Circuit Judges, and Silberman, Senior Circuit Judge

ORDER

Appellants' petition for rehearing en banc and the response thereto were circulated to the full court, and a vote was requested. Thereafter, a majority of the judges

eligible to participate did not vote in favor of the petition. Upon consideration of the foregoing, it is

ORDERED that the petition be denied.

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Michael C. McGrail
Deputy Clerk

*Circuit Judges Rogers and Brown would grant the petition for rehearing en banc.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

IN RE: NAVY CHAPLAINCY : Misc. Action No.:
: 07-0269
_____: Document No. 3

MEMORANDUM OPINION

DENYING THE PLAINTIFFS' MTION FOR A PRELIMINARY INJUNCTION

I. INTRODUCTION

In the latest phase of this continuing dispute between the plaintiffs (non-liturgical naval chaplains and their endorsing agencies) and the defendants (the United States Navy and various naval officers) ("the Navy"), the plaintiffs move for a preliminary injunction to prevent the Navy from affording preferential treatment to Catholic chaplains by allowing them to remain on active duty past the statutory separation age in order to qualify for retirement pay. The plaintiffs claim that this alleged policy constitutes a denominational preference in violation of the Navy's own regulations as well as the Establishment Clause of the First Amendment and the Due Process Clause of the Fifth Amendment. The Navy demurs, maintaining that its regulations authorize the contested policy, that the policy is a permissible accommodation of religion under the Free Exercise Clause of the First Amendment and

that the plaintiffs lack standing to challenge the policy in the first instance. Because the court concludes that the plaintiffs do not demonstrate standing to bring this claim, it denies their motion.

II. BACKGROUND

A. Factual History

Because the court has published over a dozen opinions in this case, it will dispense with a full recitation of its lengthy and convoluted factual and procedural background.[1] Pertinent to the instant motion, the plaintiffs identify 23 reserve Catholic chaplains retained on active duty past age 60 for the purpose of enabling their pensions to vest by achieving 20 years of service. Pls.' Mot. for a Prelim. Inj. at 1-2. Seven chaplains over the age of 67 were designated as "Retired Reservists Recalled to Active Duty" even though, the plaintiffs argue, they have not met the criteria for that designation. *Id.* at 2. The plaintiffs' motion requests a preliminary injunction to (1) stop the denominational preference policy; (2) enjoin future violations; and (3) require the defendants to comply with the discharge statutes. *Id.*

B. Procedural History

---

[1] For a detailed account of the factual allegations, see *Adair v. England,* 183 F.Supp.2d 31, 34-38, 40-45 (D.D.C.2002).

This motion returns to the court via a reversal from the D.C. Circuit holding that an allegation of a violation of the Establishment Clause *per se* satisfies the irreparable injury element for an injunction. *Chaplaincy of Full Gospel Churches v. England,* 454 F.3d 290, 304 (D.C.Cir.2006). The Circuit remanded for consideration of whether the plaintiffs can meet the remaining elements necessary for obtaining an injunction, namely, a likelihood of success on the merits, a lack of substantial injury to other parties and the promotion of the public interest. *Chaplaincy,* 454 F.3d at 305.

III. ANALYSIS

A. Legal Standard for a Preliminary Injunction

This court may issue interim injunctive relief only when the movant demonstrates:

> (1) a substantial likelihood of success on the merits, (2) that it would suffer irreparable injury if the injunction is not granted, (3) that an injunction would not substantially injure other interested parties, and (4) that the public interest would be furthered by the injunction.

Mova Pharm. Corp. v. Shalala, 140 F.3d 1060, 1066 (D.C.Cir.1998) (quoting *CityFed Fin. Corp. v. Office of Thrift Supervision,* 58 F.3d 738, 746 (D.C.Cir.1995)); *see*

also World Duty Free Americas, Inc. v. Summers, 94 F.Supp.2d 61, 64 (D.D.C.2000). It is particularly important for the movant to demonstrate a substantial likelihood of success on the merits. *Cf. Benten v. Kessler,* 505 U.S. 1084, 1085 (1992) (per curiam). Indeed, absent a "substantial indication" of likely success on the merits, "there would be no justification for the court's intrusion into the ordinary processes of administration and judicial review." *Am. Bankers Ass'n v. Nat'l Credit Union Admin.,* 38 F.Supp.2d 114, 140 (D.D.C.1999) (internal quotation omitted).

The four factors should be balanced on a sliding scale, and a party can compensate for a lesser showing on one factor by making a very strong showing on another factor. *CSX Transp., Inc. v. Williams,* 406 F.3d 667 (D.C.Cir.2005) (citing *CityFed Fin. Corp.,* 58 F.3d at 747). "An injunction may be justified, for example, where there is a particularly strong likelihood of success on the merits even if there is a relatively slight showing of irreparable injury." *CityFed Fin. Corp.,* 58 F.3d at 747.

Moreover, the other salient factor in the injunctive relief analysis is irreparable injury. A movant must "demonstrate at least 'some injury' " to warrant the granting of an injunction. *Id.* at 747 (quoting *Population Inst. v. McPherson,* 797 F.2d 1062, 1078 (D.C.Cir.1986)). Indeed, if a party makes no showing of irreparable injury, the court may deny the motion for injunctive relief without considering the other factors.

Id.

Because interim injunctive relief is an extraordinary form of judicial relief, courts should grant such relief sparingly. *Mazurek v. Armstrong,* 520 U.S. 968, 972 (1997). As the Supreme Court has said, "[i]t frequently is observed that a preliminary injunction is an extraordinary and drastic remedy, one that should not be granted unless the movant, *by a clear showing,* carries the burden of persuasion." *Id.* Therefore, although the trial court has the discretion to issue or deny a preliminary injunction, it is not a form of relief granted lightly. In addition, any injunction that the court issues must be carefully circumscribed and "tailored to remedy the harm shown." *Nat'l Treasury Employees Union v. Yeutter,* 918 F.2d 968, 977 (D.C.Cir.1990).

When a party seeks a mandatory injunction-to change the status quo through action rather than merely to preserve the status quo-typically the moving party must meet a higher standard than in the ordinary case: the movant must show "clearly" that she is entitled to relief or that extreme or very serious damage will result. *Adair v. England,* 217 F.Supp.2d 1, 3 n. 6 (D.D.C.2002); *Veitch v. Danzig,* 135 F.Supp.2d 32, 35 (D.D.C.2001); *see also Stanley v. Univ. of S. Cal.,* 13 F.3d 1313, 1319 (9th Cir.1994) (noting that "[i]n cases such as the one before us in which a party seeks mandatory preliminary relief that goes well beyond maintaining the status quo pendente lite, courts should

be extremely cautious about issuing a preliminary injunction"); *Abdul Wali v. Coughlin,* 754 F.2d 1015, 1025-26 (2d Cir.1985) (same); *Martinez v. Mathews,* 544 F.2d 1233, 1243 (5th Cir.1976) (same). The D.C. Circuit, however, has not yet adopted or, for that matter, rejected this rule. *Friends for All Children, Inc. v. Lockheed Aircraft Corp.,* 746 F.2d 816, 834 n. 31 (D.C.Cir.1984) (stating that "[i]n this circuit, however, no case seems to squarely require a heightened showing, and we express no view as to whether a heightened showing should in fact be required"); *see also Columbia Hosp. for Women Found., Inc. v. Bank of Tokyo-Mitsubishi, Ltd.,* 159 F.3d 636, 1998 WL 203110, at *1 (D.C.Cir.1998) (unpublished table decision) (declining to "reach the question whether the district court erred in holding that the standard applicable to a mandatory preliminary injunction is higher than that applicable to a prohibitory preliminary injunction").

B. Likelihood of Success on the Merits

The plaintiffs argue that they are likely to succeed on their claim because they possess the standing necessary to challenge the Navy's policy and because the Navy's policy violates Navy Regulations and the First and Fifth Amendments. Because the court concludes that the plaintiffs fail to demonstrate standing, the court foregoes further analysis of the merits.

1. Standing

a. Legal Standard for Standing

Article III of the Constitution limits the jurisdiction of federal courts to cases or controversies. U.S. CONST. ART. III, § 2, cl. 1. These prerequisites reflect the "common understanding of what it takes to make a justiciable case." *Steel Co. v. Citizens for a Better Env.*, 523 U.S. 83, 102 (1998). Consequently, "a showing of standing is an essential and unchanging predicate to any exercise of a court's jurisdiction." *Fla. Audubon Soc'y v. Bentsen,* 94 F.3d 658, 663 (D.C.Cir.1996) (citing *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560 (1992)).

As the party invoking federal jurisdiction, the plaintiff bears the burden of establishing standing. *Defenders of Wildlife,* 504 U.S. at 561; *Steel Co.,* 523 U.S. at 104; *City of Waukesha v. Envtl. Prot. Agency,* 320 F.3d 228, 233 (D.C.Cir.2003) (per curiam). The extent of the plaintiff's burden varies according to the procedural posture of the case. *Sierra Club v. Envtl. Prot. Agency,* 292 F.3d 895, 898-99 (D.C.Cir.2002). At the pleading stage, general factual allegations of injury resulting from the defendant's conduct will suffice. *Id.* On a motion for summary judgment, however, the "plaintiff can no longer rest on such mere allegations, but must set forth by affidavit or other evidence specific facts which for purposes of the summary judgment motion will be taken to be true." *Id.* at 899 (citing Federal Rule of Civil Procedure 56); *accord Fla. Audubon,* 94 F.3d at 666.

To demonstrate standing, a plaintiff must satisfy a three-pronged test. *Sierra Club,* 292 F.3d at 898 (citing *Defenders of Wildlife,* 504 U.S. at 560). First, the plaintiff must have suffered an injury-in-fact, defined as a harm that is concrete and actual or imminent, not conjectural or hypothetical. *Byrd v. Envtl. Prot. Agency,* 174 F.3d 239, 243 (D.C.Cir.1999) (citing *Steel Co.,* 523 U.S. at 103). Second, the injury must be fairly traceable to the governmental conduct alleged. *Id.* Finally, it must be likely that the requested relief will redress the alleged injury. *Id.* Our court of appeals has made clear that no standing exists if the plaintiff's allegations are "purely speculative[, which is] the ultimate label for injuries too implausible to support standing." *Tozzi v. Dep't of Health & Human Servs.,* 271 F.3d 301, 307 (D.C.Cir.2001). Nor is there standing where the court "would have to accept a number of very speculative inferences and assumptions in any endeavor to connect the alleged injury with [the challenged conduct]." *Winpisinger v. Watson,* 628 F.2d 133, 139 (D.C.Cir.1980).

If the plaintiff is an association, it may demonstrate standing as long as "its members would have standing to sue in their own right, the interests at stake are germane to the organization's purpose, and neither the claim asserted nor the relief requested requires members' participation in the lawsuit." *Consumer Fed'n of Am. v. Fed. Commc'ns Comm'n,* 348 F.3d 1009, 1011 (D.C.Cir.2003) (quoting *Hunt v. Wash. State Apple Adver. Comm'n,* 432 U.S. 333, 343 (1977)).

b. The Plaintiffs' Pleadings Do Not Demonstrate Standing

The Navy disputes the plaintiffs' standing to bring suit on the grounds that they fail to demonstrate a personal, particularized injury. The Navy notes that "[m]any of the individual plaintiffs are no longer on active duty," Defs.' Opp'n to Pls.' Mot. for a Prelim. Inj. ("Defs.' Opp'n") at 11, arguing therefrom that any injury the plaintiffs may have suffered is now beyond prospective relief, *id.* at 9-10. As for those plaintiffs remaining on active duty, the Navy contends that they have not "demonstrated that they are eligible for and were denied retention over age 62." *Id.* The plaintiffs counter that "those chaplains who were illegally retained are still on active duty," a state of affairs that allegedly violates the Establishment Clause because it communicates a message of sectarian preference. Pls.' Reply to Defs.' Opp'n to Pls.' Mot. for Prelim. Inj. ("Pls.' Reply") at 12. The plaintiffs clarify that they "do not assume that nonliturgicals sought and were denied the opportunity for extensions past the statutory cutoff or placement into the Retired Reserve prior to being entitled to retired pay." Pls.' Reply at 11. Rather, they argue that the Navy has instituted an unconstitutional preference system that, by violating the Establishment Clause, "communicates" a "message of preference," which constitutes a *per se* injury. *Id.* at 12-13.

I. The Plaintiffs Have not Demonstrated a Particularized Injury-In-Fact

A superficial reading of the D.C. Circuit's ruling remanding this matter might support the plaintiffs' position that standing exists. There, the Circuit held that a violation of the Establishment Clause constitutes a *per se* irreparable injury for the purposes of requesting a preliminary injunction. *Chaplaincy,* 454 F.3d at 305. In the bulk of cases, a finding of an irreparable injury *a fortiori* signals the existence of an injury-in-fact sufficient to confer standing. *Taylor v. Resolution Trust Corp.,* 56 F.3d 1497, 1508 (D.C.Cir.1995) (conceding that while "inquiry [regarding irreparable injury] overlaps with the standing issue somewhat" grounds supporting a motion for a preliminary injunction "must show more" than mere standing). But, among the justiciability doctrines feeding into the Supreme Court's pool of jurisprudence, the Establishment Clause is, it must be admitted, a queer duck. *See Littlefield v. Forney Indep. Sch. Dist.,* 268 F.3d 275, 294 n. 31 (5th Cir.2001) (recognizing that "the concept of injury for standing purposes is particularly elusive in Establishment Clause cases").

As a general rule, a federal taxpayer's interest in ensuring that Treasury funds are not spent in violation of the Constitution is too nebulous to establish the redressable "personal injury" required for Article III standing. *See, e.g., Massachusetts v. Mellon,* 262 U.S. 447, 485-486 (1923). The Supreme Court has carved a narrow exception, however, declaring that federal taxpayer standing does exist for Establishment Clause challenges to the constitutionality of exercises of congressional power under the taxing and spending

clause of Art. I, § 8. *Flast v. Cohen,* 392 U.S. 83 (1968); *Hein v. Freedom From Religion Found., Inc.,* 127 S.Ct. 2553 (2007); *but see Doe v. Tangipahoa Parish Sch. Bd.,* 494 F.3d 494, 500 (5th Cir.2007) (DeMoss concurring) (accusing the Supreme Court of "speak[ing] out of both sides of its mouth" by creating a "double standard" in which "it implicitly assumes standing in [Establishment Clause] cases where the alleged injury, in a non-Establishment Clause case, would not get the plaintiff into the courthouse").

Presumably, it is this exception that the D.C. Circuit had in mind in its recent ruling. The appeals court concluded that a violation of the Establishment Clause constitutes an irreparable injury for the purposes of a preliminary injunction. The court explicitly noted that its conclusion "presupposes, of course, that the party has standing to allege such a violation." *Chaplaincy,* 454 F.3d at 304 n. 8; *see Gettman v. Drug Enforcement Admin.,* 290 F.3d 430, 436 (D.C.Cir.2002) (affirming that an appellate court may assume standing exists without also deciding so). And when outlining a hypothetical case of a state legislature erecting an enormous Christian cross in front of the statehouse, the court observed that, in such a situation, "an offended resident would have taxpayer standing to seek removal of the cross." *Id.* at 304 (citing *Flast,* 392 U.S. at 83).

The plaintiffs, however, urge the court to conclude that the Circuit found standing for the

plaintiffs in their own right because a violation of the Establishment Clause communicates a "message" of sectarian preference. Pls.' Reply at 12-13. Specifically, the plaintiffs argue that allowing the Catholic chaplains who were allegedly illegally retained to remain on active duty "is a continuing violation of the Establishment Clause because it clearly communicates a message of preference." *Id.* at 12. The plaintiffs concede that none of them has suffered the particular and concrete injury of having "sought and [been] denied the opportunity for extensions past the statutory cutoff or placement into the Retired Reserve prior to being entitled to retired pay." *Id.* at 11. Nor have the plaintiffs, among whom are four active Navy service-members, shown that any of them are destined to encounter discrimination. *See generally* Pls.' Compls. Even were they to allege that they might encounter such discrimination in the future, a case that rests on "ifs" stands not on solid ground but on stilts of conjecture. *Cf. O'Shea v. Littleton,* 414 U.S. 488, 497 (1974) (refusing to recognize injury based on the hypothetical that if the plaintiffs violated the law in the future and if they were prosecuted they would be subjected to unconstitutional criminal procedure practices in the courts). Because the plaintiffs have not showed that any of them will be subjected to the Navy's allegedly discriminatory policy, *Saunders v. Caldera,* 193 F.Supp.2d 1, 5 (2001), the court cannot embrace the notion that they have demonstrated a "threatened injury [that] is certainly impending." *Friends of the Earth* , 528 U.S. at 190.

In fact, the plaintiffs point to no factor distinguishing their alleged injury from that of any other Navy service-member or even (from a wider perspective) that of a general federal taxpayer. The plaintiffs may find the alleged message of preference invidious, but "such [a stigmatizing] injury accords a basis for standing only to 'those persons who are personally denied equal treatment by the challenged discriminatory conduct....'" *Allen v. Wright,* 468 U.S. 737, 755 (1984) (quoting *Heckler v. Mathews,* 465 U.S. 728, 739-740 (1984)). The plaintiffs seek to invoke the abstract principle underlying the Establishment Clause to evoke their personal standing. But because such an injury is derived from general principles rather than particular, concrete facts, it amounts to only an "abstract injury in nonobservance of the Constitution," *Schlesinger v. Reservists Comm. to Stop the War,* 418 U.S. 208, 223 n. 13, 94 S.Ct. 2925, 41 L.Ed.2d 706 (1974), applicable to all and particular to none, which "is not enough" to establish standing, *Los Angeles v. Lyons,* 461 U.S. 95 (1983).

ii. The Plaintiffs Have not Demonstrated Injury Based on Federal Taxpayer Status

Thus, if the plaintiffs are to successfully establish their standing in this matter, they must do so under the narrow Establishment Cause exception to taxpayer standing. Yet here, too, the plaintiffs' case buckles for lack of solid footing. Under limited circumstances, a plaintiff's status as a taxpayer will "supply the personal

stake essential to standing." *Schlesinger,* 418 U.S. at 227. The plaintiff must show "a logical nexus between the (taxpayer) status asserted and the claim sought to be adjudicated." *Flast,* 392 U.S. at 102. Thus, the spending challenged must be specifically appropriated for the challenged activity. *Hein,* 127 S.Ct. at 2567 (characterizing as an inadequate basis of standing a challenge to "unspecified, lump-sum 'Congressional budget appropriations' for the general use of the Executive Branch") (quotations omitted). And, second, "the taxpayer must show that the challenged enactment exceeds specific constitutional limitations imposed upon the exercise of the congressional taxing and spending power." *Id.*

The plaintiffs here cannot make such a showing, as they do not challenge a congressional enactment under Art. I, § 8, but rather the action of the Executive Branch in extending the tenures of Navy service-members. The plaintiffs argue, referencing the case of *Katcoff v. Marsh,* that if law school students have taxpayer standing to challenge the constitutionality of the Army's chaplaincy program, then former and current naval service-members should have standing to challenge the Navy's chaplaincy program. Pls.' Reply at 13-14 (citing *Katcoff v. Marsh,* 755 F.2d 223, 224 (2d Cir.1985)). But *Katcoff* is distinguishable. The plaintiffs in *Katcoff* specifically challenged the decision of Congress to finance the Army's chaplaincy program in the first instance, not any particular decision by the Executive branch in running the chaplaincy. *Katcoff,*

755 F.2d at 229 (addressing the plaintiffs' argument that government funding of a chaplaincy program is unnecessary). Here, on the other hand, the plaintiffs challenge the Executive branch's management of a chaplaincy program. They do not-and they cannot-identify any congressional statute authorizing the Navy to discriminate through religious preferences in extending service-members' tenures. *Compare Flast,* 392 U.S. at 90 (framing the alleged violation as an express congressional authorization of expenditures to private schools both secular and religious) *with* 10 U.S.C. § 5142(a) (authorizing simply the organization of a Chaplain Corps "in accordance with regulations prescribed by the Secretary of the Navy"). Put simply, the injury that they allege does not flow from any particular spending decision by Congress. That being so, they cannot rely on taxpayer standing.

iii. The Plaintiff-Associations Do Not Have Standing in their own Right or on Behalf of their Plaintiff-Members

The Navy argues that the plaintiff-associations, Chaplaincy of Full Gospel Churches ("CFGC") and Associated Gospel Churches ("AGC"), do not have standing to bring this claim, either. The Navy reasons that, although the court did previously find that CFGC possessed associational standing, "it did not rule that CFGC had standing to challenge the specific practice at issue here," and the court "tied [CFGC's] standing to the standing that each individual CFGC-endorsed chaplain

would have to challenge the alleged conduct." Defs.' Opp'n at 13. The plaintiffs do not respond, other than to state: "The law of this case remains that CFGC, and by implication AGC, have standing to seek prospective relief on behalf of their members." Pls.' Reply at 13 (citing Mem. Op. (Aug. 17, 2000)).[2]

An association has standing to sue on behalf of its membership when: (a) its members have standing to sue in their own right; (b) the organization seeks to vindicate interests close to its own purposes; and (c) neither the claim nor the relief requires the participation of individual members in the suit. *Hunt v. Wash. State Apple Adver. Comm'n,* 432 U.S. 333, 343 (1977); *Warth v. Seldin,* 422 U.S. 490 (1975). In its August 17, 2000 memorandum opinion, the court concluded that CFGC had standing to survive a motion to dismiss because the individual plaintiffs had standing to pursue their claims at issue then. Mem. Op. (Aug. 17, 2000) at 11 (referencing claims of being denied advancement as well as receiving unequal treatment in assignments, worship services and job evaluations). Today, however, the plaintiffs articulate a different injury-the communication of a message of religious

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[2] The plaintiffs do not argue that Chaplaincy of Full Gospel Churches or Associated Gospel Churches has standing to sue in its own right-a proposition already denied by the court and not warranting reexamination. Mem. Op. (Aug. 17, 2000) at 10

preference by the Navy's extension of tenures for Catholic Navy service-members. The court has explained above why this allegation cannot establish the plaintiffs' standing to sue in their own right. The association-plaintiffs cannot rely upon their prior standing to sue affirmed by the court on different injuries. Therefore, they too cannot bring this case.

Because standing is a jurisdictional prerequisite to suit, the court need not examine the plaintiffs' further arguments in support of their motion for a preliminary injunction. *Steel Co.*, 523 U.S. at 101 n. 3 (1998) (affirming that a federal court has leeway to choose among threshold grounds for declining to consider a case on the merits).

IV. CONCLUSION

For the foregoing reasons, the court denies the plaintiffs' motion for a preliminary injunction. An order consistent with this Memorandum Opinion is separately and contemporaneously issued this 15th day of October, 2007.

RICARDO M. URBINA
United States District Judge

Statutory Provisions Addressing Separation and Age

10 U.S.C. § 14509. Separation at age 60: reserve officers in grades below brigadier general or rear admiral (lower half) [until September 2006]

Each reserve officer of the Army, Navy, Air Force, or Marine Corps in a grade below brigadier general or rear admiral (lower half) who has not been recommended for promotion to the grade of brigadier general or rear admiral (lower half) and is not a member of the Retired Reserve shall, on the last day of the month in which that officer becomes 62 years of age, be separated in accordance with section 14515 of this title.

10 U.S.C. § 14509. Separation at age 62: reserve officers in grades below brigadier general or rear admiral (lower half) [Current since 2006]

Each reserve officer of the Army, Navy, Air Force, or Marine Corps in a grade below brigadier general or rear admiral (lower half) who has not been recommended for promotion to the grade of brigadier general or rear admiral (lower half) and is not a member of the Retired Reserve shall, on the last day of the month in which that officer becomes 62 years of age, be separated in accordance with section 14515 of this title.

10 U.S.C. § 14515. Discharge or retirement for age

Each reserve officer of the Army, Navy, Air Force, or Marine Corps who is in an active status or on an inactive-status list and who reaches the maximum age specified in section 14509, 14510, 14511, or 14512 of

this title for the officer's grade or position shall (unless the officer is sooner separated or the officer's separation is deferred or the officer is continued in an active status under another provision of law) not later than the last day of the month in which the officer reaches that maximum age--

(1) be transferred to the Retired Reserve if the officer is qualified for such transfer and does not request (in accordance with regulations prescribed by the Secretary concerned) not to be transferred to the Retired Reserve; or

(2) be discharged from the officer's reserve appointment if the officer is not qualified for transfer to the Retired Reserve or has requested (in accordance with regulations prescribed by the Secretary concerned) not to be so transferred.

10 U.S.C. § 14703. Authority to retain chaplains and officers in medical specialties until specified age

(a) Retention.--Notwithstanding any provision of chapter 1407 of this title and except for officers referred to in sections 14503, 14504, 14505, and 14506 of this title and under regulations prescribed by the Secretary of Defense--

(1) the Secretary of the Army may, with the

officer's consent, retain in an active status any reserve officer assigned to the Medical Corps, the Dental Corps, the Veterinary Corps, the Medical Services Corps (if the officer has been designated as allied health officer or biomedical sciences officer in that Corps), the Optometry Section of the Medical Services Corps, the Chaplains, the Army Nurse Corps, or the Army Medical Specialists Corps;

(2) the Secretary of the Navy may, with the officer's consent, retain in an active status any reserve officer appointed in the Medical Corps, Dental Corps, Nurse Corps, or Chaplain Corps or appointed in the Medical Services Corps and designated to perform as a veterinarian, optometrist, podiatrist, allied health officer, or biomedical sciences officer; and

(3) the Secretary of the Air Force may, with the officer's consent, retain in an active status any reserve officer who is designated as a medical officer, dental officer, Air Force nurse, Medical Service Corps officer, biomedical sciences officer, or chaplain.

(b) Separation at specified age.--An officer may not be retained in active status under this section later than the date on which the officer becomes 68 [67 until 2006] years of age.

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(2)

No. 08-1057

Supreme Court, U.S.
FILED
MAR 25 2009
OFFICE OF THE CLERK

In The Supreme Court of the United States

IN RE NAVY CHAPLAINCY;

CHAPLAINCY OF FULL GOSPEL CURCHES, ET AL.,
Petitioners,

v.

UNITED STATES NAVY, ET AL.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITIONERS' SUPPLEMENTAL BRIEF

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BASIS FOR PETITIONERS' SUPPLEMENTAL BRIEF

Petitioners submit this brief pursuant to with Sup. Ct. R. 15.8, addressing the importance and application of *Pleasant Grove City, Utah, v. Summum*, 555 U.S. __, 129 S.Ct. 1125 (2009) to Petitioners' Petition for Certiorari (the "Petition") in Docket No. 08-1057. Petitioners filed their Petition February 13, 2009, which was docketed on February 19, 2009. On February 25, 2009, the Court issued *Summum*. *Summum*'s analysis and holdings have direct application to the issue Petitioners present to the Court and further show the clear error of the Court of Appeals.

I. *SUMMUM* HAS DIRECT APPLICATION TO THIS PETITION.

Summum has direct application to this Petition because it establishes new precedent which, as applied to the instant case, shows the Court of Appeals' majority opinion is clearly wrong. *Summum* identifies and defines government decisions underlying challenged actions as "government speech." "In sum, we hold that *the City's decision* to accept certain privately donated monuments and rejecting respondent's is best reviewed as *a form of government speech*." *Summum*, 129 S.Ct. at 1138 (emphasis added). In other words, the *government's decision is itself government speech*. *Summum* held that the focus is on the government's *decision* when examining messages communicated by actions challenged under the First Amendment. This is the Court's first linkage of a government's decision and

the resulting governmental action communicating a governmental message, establishing a legal unity between decision and action, with each now defined as "government speech" and subject to judicial review. *Id.*

Summum reaffirmed that "government speech must comport with the Establishment Clause," *id.* at 1132, which also means the decision "must comport with the Establishment Clause." That is the issue in this case. In the Establishment Clause context, this Court and the Courts of Appeals have focused their analysis on the message the government's challenged action communicates to the "objective observer." *See, e.g., McCreary County v. ACLU of KY*, 545 U.S. 844, 862-66 (2005) (describing the "objective observer"). Integral to the objective observer's analysis of the message is the purpose of the government's challenged action, *id.* at 860- 62; 862 (in some cases, "the government action itself bespoke the purpose"), which indirectly presupposes or assumes the challenged action's resulting message was the result of the government's decision-making process. *See id.* at 870- 872 (describing the County's history of decisions addressing the Ten Commandments display). As discussed below, *Summum* correctly links the government's decision that produced the challenged action with the challenged action, showing that there is a unity and inseparability between decision and result because they both are government speech.

In the case at bar, the Court of Appeals held the Navy's illegal appointment and illegal retention of Catholic clergy as chaplains on active duty until they

acquired 20 years time in service to qualify for a pension did not communicate an unconstitutional message of prejudice to Petitioners and therefore produced no harm. A-16. It came to this conclusion despite the fact the Navy's illegal clergy appointment and retention program existed only for over-age Catholics, a clear and undisputed denominational gerrymander. *See* A- 33 ("government action that draws a line around a religious denomination in a community can send a symbolic message of preference that needs no words just as easily as the government's direct presentation of a religious symbol.") (Rogers, J., dissenting). Each of the Navy's illegal actions, *i.e.,* illegal appointment, retention and transfer to and recall from the Retired Reserve, resulted from the Navy's conscious decisions to (1) violate the law and (2) prefer Catholic clergy. Under *Summum*, this is government speech which, by its very nature, has a message with a purpose and context. Courts must review the speech, context and the audience to address constitutional challenges such as Petitioners'.

Petitioners argue that this Court's religious display and prayer cases hold a government's Establishment Clause violation sends dual unconstitutional messages--preference to those in the preferred religion and prejudice and hostility to those not preferred. *See* Petition, 14-19 (citing Supreme Court cases), 33-36 (citing 10 Circuit Court precedents). The Navy's messages originate in and are focused at the Chaplain Corps and its members including Petitioners, and communicate the Navy's preferences with respect to clergy and chaplains. Yet, the Court of Appeals found "significant differences

between Petitioners' case and the religious display and prayer cases":

> In the religious display and prayer cases, the Government was actively and directly communicating a religious message through religious words or religious symbols-in other words, it was engaging in religious speech that was observed, read, or heard by the plaintiffs in those cases. Here, by contrast, *the Navy is not communicating a religious message* through religious words or religious symbols.

A-15-16 (emphasis added). Thus, the Court of Appeals determined that the Respondents' decisions and actions in illegally appointing and retaining over-age Catholic clergy communicate no messages at all. This is in direct conflict with *Summum*'s analysis, logic and holding. *Summum* held that government decisions producing the actions Petitioners challenge are *government speech* and that speech, *i.e.*, the message, "must comport with the Establishment Clause." 129 S.Ct. at 1132.

II. *SUMMUM* ESTABLISHED THE GOVERNMENT'S DECISION AS THE PROPER FOCUS FOR FIRST AMENDMENT ANALYSIS.

At first glance, *Summum* may appear to be *sui generis*, addressing only the unique status of monuments as vehicles of government communication. However, *Summum*'s underlying

analysis, logic and precedent show that it addresses the nature of government decisions as government speech that communicate a message subject to First Amendment constraints.

The question *Summum* addressed was whether Pleasant Grove City's *decision* to reject a private religious monument for display in the City's public park violated the First Amendment. "In 2005, respondent filed this action against the City and various local officials (petitioners), asserting, among other claims, that petitioners had violated the Free Speech Clause of the First Amendment by accepting the Ten Commandments monument but rejecting the proposed Seven Aphorisms monument." *Id.* at 1130.

Unlike other Ten Commandment cases, the constitutionality of the City's previously accepted Ten Commandment display was not at issue. Rather, the gravamen of the case was the City's refusal, *i.e.*, a decision *not* to accept, the *Summum* Respondent's display. The Tenth Circuit held the City "was required to accept the monument because a public park is a traditional public forum." *Id.* This Court reversed, finding the placement of a permanent monument in a public park is best viewed as a form of government speech and is therefore not subject to strict scrutiny under the Free Speech Clause. *Id.* at 1132-33. Although the Court distinguished between transitory speech associated with public forums and permanent speech reflected in a monument, *id.* at 1137, the Court's analysis examined the City's decision process as the appropriate focus to (1) determine the proper First Amendment standard of

review and (2) evaluate what the City communicated through and as a result of that decision.

The context of the case forced the Court to examine the nature of the City's decision, the means through which government exercised its power. The constitutionality of the City's rejection of the offered monument, *i.e.*, its decision to reject, was the issue before the Court. "No prior decision of this Court has addressed the application of the Free Speech Clause to a government entity's acceptance of privately donated, permanent monuments for installation in a public park, and the parties disagree sharply about the line of precedents that governs this situation." *Id.* at 1131. Implicit in the Court's application of Free Speech precedent is that it was addressing the message communicated by both acceptance and rejection of what are clearly religious displays, each the result of government decision-making. The Court's analysis of why governments accept or reject monuments shows decisions are made based on government-derived criteria, resulting in a message to the public consistent with government's objective.

> Government decision makers select the monuments that portray what they view as appropriate for the place in question, taking into account such content-based factors as esthetics, history, and local culture. The monuments that are accepted, therefore, *are meant to convey and have the effect of conveying a government message, and they thus constitute government speech.*

Id. at 1134 (emphasis added); *see also id.* at 1139 ("Nor is it likely ... that the government will be able to avoid political accountability for the views that it endorses or expresses") (Stevens, J., concurring).

Summum also found the monument selection process was the means by which the City "effectively controlled" the monument's message. *Id.* at 1134 (citing *Johanns v. Livestock Marketing Association*, 544 U.S. 550, 560-61 (2005)). Because placing a monument, whether publicly or privately financed, is "expressive conduct", *id.* at 1136, *Summum* found the City's decision to rejectt an offered monument was itself speech. The decision was as much "expressive conduct" as the monument itself. In *McCreary County*, the Court focused on the display which the County had decided to exhibit, 545 U.S. at 869-72. The Court had no display to evaluate in *Summum* and had to focus on the City's decision which communicated the City's intent and will as government speech. "[W]e hold that the City's decision to accept certain privately donated monuments while rejecting respondent's is best viewed as a form of government speech." *Summum*, 129 S. Ct. at 1138.

III. THE COURT OF APPEALS' DECISION IN THIS CASE IS CONTRARY TO *SUMMUM*'S HOLDING AND LOGIC.

A. Analysis of Respondents' Decisions Under *Summum* Shows They Intended To Communicate a Harm Producing Message of Prejudice to Petitioners.

Petitioners argued below that the challenged Navy program had three distinct parts: illegal appointment of Catholic clergy beyond the legal age limits, illegal continuation of Catholic clergy beyond statutory age limits, and (for some) illegal transfer to the Retired Reserve with an illegal recall to active duty. Petition at 8. Each of these components requires a decision by a Navy decision-maker. That decision was and is intended to affect the Navy Chaplain Corps of which Petitioners are members. The result of these decisions is a denominational gerrymander or preference; the Navy restricted to Catholics its special three-part program guaranteeing a pension in violation of Title 10 and the Constitution. Under *Summum*, each Navy decision at each of the programs' three component parts is government speech communicating not only the Navy's arrogant defiance of the law, but it's preference for Catholics over the Petitioners.

Respondents cannot deny the decisions underlying their challenged actions were and are directed at members of the Navy Chaplain Corps, including Petitioners. The precedent of this Court and ten other Circuits establish that such an unconstitutional message produces injury. *See, e.g. County of Allegheny v. ACLU,* 492 U.S. 573, 595 (1989) ("Endorsement sends a message to non-adherents that they are outsiders, and an accompanying message to adherents that they are insiders, favored members of the political community."); *Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 302 (D.C. Cir. 2006) (same)). *See also* Petition at 14-38 (citing cases). Petitioners

are the intended targets of the Navy's message of disfavor, Catholics are the intended targets of its preference. "Respondents' willingness to break their own regulations to illegally appoint ineligible, over age Catholic priests as chaplains and further break the law to enable them to attain a pension is an overt act communicating clear messages of denominational favoritism and prejudice." *Id.* at 18. The ruling in *Summum* contradicts the Court of Appeals' holding that the Navy communicated *no* message at all from which the Petitioners suffered harm. A-15-16.

Summum also is relevant to this Petition because the favored chaplains are in effect "monuments" to the Navy's religious prejudice and preference. *Summum* noted that "monuments, [as opposed to transitory speakers or visitors in a park] endure. They monopolize the use of the land on which they stand and interfere permanently with other uses of public space." 129 S.Ct. at 1137. Similarly, the illegally appointed and retained chaplains take up promotion spaces that would otherwise be available. Petition at 32 (citing Petitioners' harm from reduction of promotion opportunity recognized by *Chaplaincy,* 454 F.3d at 297). There is nothing transitory about the challenged chaplains. For example, LT Steed was illegally assessed at age 57 and illegally retained on active duty for 17 years, Petition at 8. They come in daily contact with Petitioners and their class, as exemplified by Petitioner Stewart's duty assignment to work with LCDR Erestain at Bethesda Naval Medical Center. *Id.* Under *Summum*'s analysis, both the Navy's decision and the illegally appointed chaplains themselves convey forbidden messages of favoritism and prejudice in violation of the

Establishment Clause, thereby harming Petitioners and establishing their standing to challenge the illegal practice.

B. Application of *Summum* Does Not Expand This Court's Standing Precedent.

Analysis under *Summum* of the Navy's decisions allowing the establishment of Respondents' three part illegal program clearly shows the Court of Appeals majority's concern about Petitioners wedging wide the court house doors, A-16, is illogical and unfounded. The challenged actions are the result of Navy decisions affecting its Chaplain Corps, a small community of clergy. The average citizen has no knowledge of how the Chaplain Corps works. An ordinary citizen meeting LCDR Erestain would have no clue he was a symbol of the Navy's preference for Catholics and disdain for non-liturgical clergy such as Petitioner Stewart. Petitioners' knowledge of how the Chaplain Corps works and their interaction with Navy chaplains give them a clear picture that LCDR Erestain and others like him are the result of the Navy's decisions to illegally appoint and retain over-age Catholic clergy until they illegally qualify for a pension.

Because Petitioners know the system, the Navy decisions communicate a clear message of second-class citizenship to Petitioners and favoritism for Catholics. Petitioner Stewart's Complaint (*Gibson v. U.S. Navy*) ¶ 54.b identifies the challenged practice as one of many which show the Navy "has impermissibly endorsed Catholic and Liturgical Protestant as

preferred religious traditions in violation of ... the Establishment Clause." *Id.* at ¶ 55. Stewart and the Petitioners actually see, experience and rub shoulders with the practical results of the Navy's challenged decisions and practices—the living messages of the preference for Catholics and second-class citizenship of the Petitioners. This exposure to and injury from the Navy's decisions is unique to the Petitioners and is not experienced by the average citizen.

Summum examines the government speech reflected in those decisions says in their context and whether it comports with the Establishment Clause. Respondents cannot deny the challenged program was designed for Catholic clergy and operates only for the Chaplain Corps. The Navy's preference for Catholic clergy, to the point that the Navy will violate the law and Constitution, shows it is not religiously neutral but has favorites. The Navy's decisions communicate unconstitutional favoritism and second-class citizenship to Petitioners. *Summum*'s analysis shows Respondents' "government speech", communicated by the decisions establishing the challenged program, was designed to and does harm Petitioners. Respondents' decisions took place in and were designed to affect the Chaplain Corps and communicate Respondents' preferences and prejudices based upon its members' denominations.

The context of Respondents' decisions and actions, the community of Navy chaplains, distinguishes this case from *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464 (1982), relied on by the Court of Appeals, A-16. *Valley Forge* found the plaintiffs

had no injury because they had no connection with the community where the challenged action occurred and read about it in the newspaper. Petitioners are members of the small community in which Respondents' decisions were made and to which their resulting actions are addressed. Petitioner Stewart did not read about LCDR Erestain in the newspaper, he shook his hand and worked with him, an exposure to the Navy's messages at the most personal level. "Appellants' charge is based on an injury distinct to their status within the Chaplain Corps, [citations omitted], and 'like *[School District of Abington Twp. v]. Schempp*, 374 U.S. 203, 224 n. 9 [(1962)], *Valley Forge* recognized that direct contact with an unwelcome religious experience or display works a personal injury distinct from and in addition to each citizen's general grievance against unconstitutional government conduct.'" A-27-28 (Rogers, J., dissenting) (quoting *Suhre v. Haywood County*, 131 F.3d 1083, 1086 (4th Cir. 1997)). *See also* Petition at 34-35 (listing 10 Circuit Court decisions holding direct exposure to Establishment Clause violation provides injury and standing). *Summum* shows the Court of Appeals was in error.

CONCLUSION

The Court of Appeals' decision is in conflict with *Summum*'s logic, analysis, and holding. Petitioners respectfully request the Court to grant their request for a writ of certiorari to review and realign the challenged decision with this Court's precedent and that of the other Courts of Appeals.

Respectfully submitted,

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